82-178

No.

Office - Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MITSUI & CO., LTD., *et al.*,
Petitioners,

v.

INDUSTRIAL INVESTMENT
DEVELOPMENT CORPORATION, *et al.*,
Respondents.

PETITION FOR FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

B. J. BRADSHAW
Counsel of Record
JERRY E. SMITH
FULBRIGHT & JAWORSKI
800 Bank of the Southwest Bldg.
Houston, Texas 77002
(713) 651-5151

KEITH A. JONES
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether a foreign commercial dispute that has no significant anticompetitive effect upon United States commerce is within the jurisdictional scope of the Sherman Act.

2. Whether a plaintiff who alleges only injury from competition, and does not allege injury of a kind that the antitrust laws were intended to prevent, has standing to sue for treble damages under the Clayton Act.*

---

* The parties in the court of appeals were petitioners Mitsui & Co., Ltd., and Mitsui & Co. (U.S.A.), Inc., and respondents Industrial Investment Development Corporation, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd.

Mitsui & Co. (U.S.A), Inc., is a subsidiary of Mitsui & Co., Ltd. The other subsidiaries and affiliates of Mitsui & Co., Ltd., are listed in Appendix G, *infra*.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR ALLOWING THE WRIT	5
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Bichan v. *Chemtron Corp.*, [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 1071 at 32 9

Blue Shield of Virginia v. *McCready*, 50 U.S.L.W. 4723 (June 21, 1982) 6, 10, 11, 12

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ..... *passim*

Chrysler Corp. v. *Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert denied*, 102 S.Ct. 388 (1981) 5, 6, 9, 11

Havoco of America, Ltd v. *Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980) 10

John Lenore & Co. v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977) 5, 6, 9

National Bank of Canada v. *Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981) 6, 7, 8

Northwest Power Products, Inc. v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) 10

Piper Aircraft Co. v. *Reyno*, 102 S. Ct. 252 (1981) ... 7

United States v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) 7

United States v. *National City Lines, Inc.*, 334 U.S. 573 (1948) 5

Wickard v. *Filburn*, 317 U.S. 111 (1942) 6

STATUTES:

Clayton Act § 4, as amended, 15 U.S.C. § 15 ..... 3, 9, 10

Clayton Act § 12, 15 U.S.C. § 22 8

Sherman Act §§ 1 and 2, as amended, 15 U.S.C. §§1 and 2 ..... *passim*

MISCELLANEOUS:

Rahl, *American Antitrust and Foreign Operations: What Is Covered?*, 8 Cornell Int'l L.J. 1 (1974) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

MITSUI & CO., LTD., *et al.*,

Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, *et al.*,

Respondents.

PETITION FOR FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mitsui & Co., Ltd., and Mitsui & Co. (U.S.A.), Inc., hereby petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 671 F.2d 876. The opinion of the district court (App. B, *infra*) is not officially reported. [1]

---

[1] An earlier opinion of the district court (App. C., *infra*) dismissing the complaint under the act of state doctrine is reported at 1978-1 Trade Cas. ¶ 62,130. The opinion of the court of appeals (App. D, *infra*) reversing that order of dismissal is reported at 594 F.2d 48. This Court's order denying the petition for a writ of certiorari to review that decision is reported at 445 U.S. 903.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*) was entered on March 31, 1982. The court's order denying rehearing (App. F, *infra*) was entered on May 5, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. §§ 1 and 2, in pertinent part provide:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .
>
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

Section 4 of the Clayton Act, as amended, 15 U.S.C. § 15, in pertinent part provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

STATEMENT

This case arises out of competition between petitioner Mitsui & Co., Ltd. ("Mitsui"), and Forest Products Corporation ("Forest Products"), the predecessor in in-

terest of respondent Industrial Investment Development Corporation ("Industrial Investment"), for the right to purchase the logs harvested by an Indonesian corporation, P. T. Telaga Mas Kalimantan Co. ("Telaga Mas"), from a particular tract of forest on the Island of Kalimantan (Borneo) in Indonesia. The forest tract of some 100,000 hectares was controlled by Telaga Mas under a concession granted to it by the Indonesian government. Forest Products attempted to form a joint venture with Telaga Mas to exploit the concession. After considerable internal debate and prolonged legal skirmishing in Indonesia between rival groups of its shareholders, Telaga Mas determined not to proceed with the joint venture. Instead, Telaga Mas obtained financing from Mitsui to develop the concession by contracting to sell its log production exclusively to Mitsui's American subsidiary, Mitsui & Co. (U.S.A.), Inc. The logs so obtained were imported into Japan.

Disappointed with the result of its efforts in Indonesia, Industrial Investment and two other related corporations brought this action in the United States District Court for the Southern District of Texas, asking for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, on the ground that, by inducing Telaga Mas to deal with it rather than with Forest Products, Mitsui had violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.[2] Mitsui moved to dismiss the action on four separate grounds: that adjudication was barred by the act of state doctrine; that the dispute between the parties was beyond the

---

[2] To support its claim under the Sherman Act, Industrial Investment alleged a conspiracy between Mitsui, its American subsidiary, and Telaga Mas. In the alternative, Industrial Investment alleged conversion and tortious interference with Forest Products' contractual rights.

reach of American antitrust laws; that Industrial Investment lacked standing to sue for treble damages under the Clayton Act because the injury it had alleged was not of the kind that the antitrust laws were intended to prevent; and that under the doctrine of *forum non conveniens* the case should not be tried in the courts of the United States. Thus, the burden of Mitsui's motion was that an essentially local Indonesian dispute, involving competition between potential buyers from a single logging concession in that country, did not present an issue appropriately justiciable under American antitrust laws or in an American court.

The district court initially dismissed the action on the ground that adjudication of the dispute was barred by the act of state doctrine. App. C, *infra*. The court of appeals reversed, App. D, *infra*, and this Court denied certiorari, 445 U.S. 903 (1980). On remand, the district court entered a second order of dismissal, on the grounds of extraterritoriality, lack of standing, and *forum non conveniens*. App. B, *infra*. Once again, the court of appeals reversed. App. A, *infra*.

In considering the issue of extraterritoriality, the court of appeals began with the premise that any alleged restraint of trade, anywhere in the world, that "affects the flow of commerce into or out of the United States is within the scope of the Sherman Act." App. A, *infra*, p. 6a. Merely on the basis of its assumption that Industrial Investment's inability to purchase logs from Telaga Mas could have affected the total quantity of lumber imported into the United States, without considering whether such an effect upon United States commerce was either significant or anticompetitive, the court held that the dispute between Industrial Investment and Mitsui was within the reach of American antitrust laws.

With respect to the question of standing, Mitsui had argued that under this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), a plaintiff, in order to be permitted to go to trial, must allege injury of a kind that the antitrust laws were intended to prevent. The court of appeals rejected this reading of *Brunswick*. The court stated that "*Brunswick* is not a standing case," App. A, *infra*, p. 17a, and expressed the view that "[i]t is analytically unsound . . . to consider the requirement of antitrust injury an additional component of the standing inquiry," *id.* at 18a. The court acknowledged that, following *Brunswick*, "two other circuits have held that antitrust injury is a component of standing. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1234 (6th Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 498-500 (9th Cir. 1977)." *Id.* at 20a n.15. But the court explicitly "disagree[d] with their analysis," *id.*, and held that Industrial Investment, in order to proceed to trial, need not allege an injury of the type that the antitrust laws are intended to prevent.[3]

REASONS FOR ALLOWING THE WRIT

The Fifth Circuit's holding on the issue of extraterritoriality—that an alleged foreign restraint of trade may be within reach of the Sherman Act without regard to whether its effect upon United States com-

---

[3] The court of appeals further held that this Court's decision in *United States* v. *National City Lines, Inc.*, 334 U.S. 573 (1948), foreclosed recourse to the doctrine of *forum non conveniens* in every antitrust case and was not limited to cases in which the alternative venue lies in a court of the United States.

merce is either significant or anticompetitive—conflicts with *National Bank of Canada* v. *Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981). The Fifth Circuit's holding on the issue of standing—that an antitrust plaintiff may have standing to sue, despite the fact that the specific injury alleged is not of the kind the antitrust laws were intended to prevent—conflicts with this Court's decisions in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Blue Shield of Virginia* v. *McCready*, 50 U.S.L.W. 4723 (June 21, 1982), and with *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 102 S.Ct. 388 (1981), and *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977). Both issues are important to the administration of the antitrust laws.

1. In the view of the court of appeals, an alleged foreign restraint of trade is within the scope of the Sherman Act so long as it "affects the flow of commerce into or out of the United States . . . ." App. A, *infra*, p. 6a. The court reasoned accordingly that the Sherman Act extends to the transactions at issue in this case merely because logs originating in Indonesia and thereby potentially available to the United States market had been imported instead into Japan. The jurisdictional standard thus applied is far too loose. While it could, perhaps, be said that the importation of logs into Japan "affects" commerce of the United States in some attenuated sense, *e.g.*, in the same sense that a farmer's consumption of home-grown wheat was said to "affect" *interstate* commerce in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), Congress cannot be understood as having intended to extend the reach of American antitrust laws into foreign territories on the basis of such insubstantial connections with American commerce. *See generally, e.g.*, Rahl, *American Antitrust and Foreign Operations: What Is Covered?*, 8 Cornell Int'l L.J. 1 (1974). Applying the reasoning of the court of

appeals, a right to bring an action for treble damages in courts of the United States could arise from practically any international competition anywhere in the world.

In holding that an Indonesian logger's substitution of one exclusive buyer for another is within the reach of American antitrust laws, merely because the disappointed buyer has alleged that it might have imported some of the logs into the United States, the Fifth Circuit has gone far toward converting the Sherman Act into a worldwide charter for bringing foreign business disputes before American courts. If this local Indonesian matter implicates American antitrust law, almost any foreign commercial dispute can be made justiciable in the United States with the aid of cleverly drafted pleadings. "The flow of litigation into the United States would increase and further congest already crowded courts." *Piper Aircraft Co.* v. *Reyno*, 102 S.Ct. 252, 264 (1981). The American judicial system is ill-equipped to act as the international arbiter of international commerce, and Congress has not thrust that role upon it.

The Fifth Circuit in this case erred in failing to require at least a plausible allegation of a significant *anticompetitive* effect upon United States commerce before asserting jurisdiction. Its decision conflicts with that of the Second Circuit in *National Bank of Canada*. In that case, the Second Circuit drew upon this Court's decision in *Brunswick* and upon Judge Learned Hand's opinion in *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945), to define with care the proper jurisdictional limits of American antitrust laws:

> [T]he inquiry should be directed primarily toward whether the challenged restraint has, or is intended

> to have, any anticompetitive effect upon United States commerce. . . .
>
> Our jurisdiction is not supported by every conceivable repercussion of the action objected to on United States commerce. Only those injuries to United States commerce which reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation constitute effects sufficient to confer jurisdiction. . . . [T]here must be at least *some* anticompetitive effects to meet the threshold requirement of jurisdiction.

National Bank of Canada v. *Interbank Card Ass'n*, 666 F.2d at 8 (emphasis in original).

If the Fifth Circuit had applied the standard articulated by the Second Circuit, it would have concluded that this Indonesian dispute was not within the reach of the Sherman Act. In *National Bank of Canada*, the exclusion of a firm from the entire Canadian national market did not pose "a foreseeable threat to United States commerce of a type sufficient to justify assertion of jurisdiction." *Id.* at 9. *A fortiori*, exclusion of Industrial Investment from a single Indonesian logging concession does not entail the kind of anticompetitive effect upon United States commerce that would warrant the exercise of jurisdiction by an American court.[4]

The need for uniform rules of decision is especially acute under the antitrust laws, because of a plaintiff's virtually unlimited freedom to choose its forum. *See* Section 12 of the Clayton Act, 15 U.S.C. § 22. This Court

---

[4] Plainly, the fact that Mitsui's American subsidiary was the nominal purchaser of logs from Telaga Mas is not enough to establish jurisdiction. In *National Bank of Canada*, there was an "American actor clearly involved in this action," 666 F.2d at 9, but that properly was deemed irrelevant to the jurisdictional analysis.

should grant review of this case to resolve the conflict between the Second and Fifth Circuits and thereby ensure that the extraterritorial application of the Sherman Act to international commercial disputes will be governed by a uniform rule, no matter where a plaintiff chooses to sue.

2. In *Brunswick*, this Court described the nature of the injury that must be shown in order to justify recovery of treble damages under section 4 of the Clayton Act:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489 (emphasis in original). The Sixth Circuit correctly has "interpret[ed] *Brunswick* to mean that the pleading of 'antitrust injury' is an essential component of standing under § 4 of the Clayton Act." *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d at 1234. The Ninth Circuit also has recognized that to have standing to sue for treble damages under section 4 of the Clayton Act, a plaintiff must show "that he has suffered an '. . . antitrust injury . . . of the type the antitrust laws were intended to prevent. . . .'" *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d at 500, quoting from *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489.[5]

If the court below had properly applied this rule of standing, it would have been compelled to affirm the

---

[5] On June 25, 1982, the Seventh Circuit also endorsed this view in *Bichan* v. *Chemetron Corporation*, [July-Dec.] Antitrust and Trade Reg. Rep. (BNA) No. 1071 at 32.

district court's order dismissing the case. The gravamen of Industrial Investment's complaint, as laid out in specific, detailed allegations, is that it has been displaced by Mitsui as the sole purchaser of logs from Telaga Mas.[6] Thus, the complaint itself alleges merely an injury that is *not* of a "type the antitrust laws were intended to prevent." The mere substitution of one buyer for another is not anticompetitive. In the competition between Mitsui and Forest Products for exclusive access to the logging concession operated by Telaga Mas, only one rival could win. Of necessity, the other rival would suffer a commercial defeat. But the commercial defeat that a potential buyer suffers when it loses access to a particular supplier is merely an injury *from* competition.[7] As such, it is not injury "of the type the antitrust laws were intended to forestall." *Blue Shield of Virginia* v. *McCready*, 50 U.S.L.W. at 4728 n.21. It therefore does not confer standing to sue under section 4 of the Clayton Act.

The Fifth Circuit, however, refused to make this inquiry into standing. Instead, the court expressly disagreed

---

[6] Industrial Investment alleges, but without any corroborative allegations of specific facts, that as a result of the displacement Mitsui "monopolized the relevant market." App. A, *infra*, p. 21a n.16. Mitsui, however, resells its logs in Japan, *id.* at 8a, and Industrial Investment has made no colorable allegation that Mitsui has foreclosed competition in the Japanese lumber market as a consequence of its access to the Indonesian logging concession operated by Telaga Mas.

[7] The gist of Industrial Investment's complaint appears to be that although the injury was from competition, the competition was unfair. But the "substitution of one competitor for another by means of unfair competition is not in itself a violation of the antitrust laws." App. A, *infra*, p. 20a n.16. *See, e.g., Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980); *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

with the reading that the Sixth and Ninth Circuits had given to *Brunswick*, stating that "*Brunswick* is not a standing case," Pet. App. A, *infra*, p. 17a, and that "[i]t is analytically unsound, we think, to consider the requirement of antitrust injury an additional component of the standing inquiry," *id.* at 18a. The court was wrong on both counts.

This Court's decision in *Brunswick* establishes a requirement in the nature of standing. In *Brunswick*, the case had gone to trial and damages had been awarded. But the sole question before this Court on certiorari was whether, assuming for purposes of analysis that an antitrust violation had been committed, the nature of the plaintiff's injury entitled it to recover. The Court held that because the plaintiff had failed to allege and prove an injury of the type that the antitrust laws were intended to prevent, the defendant was entitled to judgment notwithstanding the verdict. This decision necessarily implicates a rule of standing:

> Although the Supreme Court did not explicitly describe the issue in *Brunswick* as one of standing, that decision clearly establishes that a plaintiff must plead an injury of the type § 4 was intended to remedy before his case will be heard. . . . If the failure to prove cognizable damages requires a judgment for the defendant notwithstanding the verdict, . . . it follows that a failure to allege cognizable damages compels the dismissal of the complaint.

Chrysler Corp. v. *Fedders Corp.*, 643 F.2d at 1234. This Court plainly subscribed to this view in *Blue Shield of Virginia*, where the legal sufficiency of the allegation of injury was treated as a question of standing. *See* 50 U.S.L.W. at 4725-26, 4727 n.19.

The requirement that a plaintiff must allege a legally sufficient injury in order to have standing to sue is

analytically sound. There is no reason to permit a plaintiff to go to trial if his theory of injury is insufficient to support a verdict. The Fifth Circuit's refusal to recognize "antitrust injury" as an essential component of standing simply leads to unnecessary trials and the needless prolongation of expensive, complex litigation. This Court should grant review in order to correct the Fifth Circuit's departure from *Brunswick*.[8]

[8] In the alternative, in view of the intervening decision in *Blue Shield of Virginia*, the Court could summarily reverse, vacate, and remand for the inquiry into standing that the court of appeals erroneously failed to undertake.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

B. J. BRADSHAW
Counsel of Record
JERRY E. SMITH
FULBRIGHT & JAWORSKI
800 Bank of the Southwest Bldg.
Houston, Texas 77002
(713) 651-5151

KEITH A. JONES
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

July, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 81-2175

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, *et al.*,
Plaintiffs-Appellants,

v.

MITSUI & CO., LTD., *et al.*,
Defendants-Appellees.

March 31, 1982

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, REAVLEY and SAM D. JOHNSON, *Circuit Judges.*

REAVLEY, *Circuit Judge:*

This is an antitrust suit. The district court initially granted the defendants' motion for summary judgment on the single ground that the action was barred by the act of state doctrine. We reversed. 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903, 100 S.Ct. 1078, 63 L.Ed.2d 318 (1980). On remand, the district court turned back to the same motion of the defendants and granted summary judgment on the three remaining grounds: (1) that defendants' conduct is beyond the extra-territorial scope of the antitrust laws; (2) that plaintiffs have no standing to sue under the antitrust laws; and (3) *forum non conveniens*. [1] The court declined to exercise pendent jurisdic-

---

[1] The defendants and the court below considered these three to be four grounds for summary judgment, as we also listed them in our prior opinion. *See* 594 F.2d at 49 & n.2 (expressly reserving decision

tion over plaintiffs' nonfederal claims, and dismissed the suit. [2] Defendants were not entitled to summary judgment on any of the grounds they invoked. We again reverse and remand.

I. *Background*

The plaintiffs are an American corporation, Industrial Investment Development Corporation ("Industrial Investment"), and its two Hong Kong subsidiaries, Indonesia Industrial Investment Corporation, Ltd. ("Indonesia Industrial"), and Forest Products Corporation, Ltd. ("FPC"). The defendants-appellees are a Japanese corporation, Mitsui & Co., Ltd. ("Mitsui-Japan") and its American subsidiary, Mitsui & Co. (U.S.A.), Inc. ("Mitsui-U.S.A."). A third defendant is an Indonesian corporation, P. T. Telaga Mas Kalimantan Company, Ltd. ("Telega Mas"), which was served but has never appeared in this action.

Plaintiffs claim that the three defendants conspired to keep plaintiffs out of the business of harvesting trees in East Kalimantan (Borneo), Indonesia and exporting logs and lumber from Indonesia to the United States and other countries. Plaintiffs allege that defendants' conspiracy was intended to and did unreasonably restrain and monopolize the foreign commerce of the United States, in violation of §§ 1 and 2 of the Sherman Act,

---

on these grounds). As will be seen, however, we consider two of those grounds under the single issue of standing.

[2] Because we reverse the district court's decision concerning the antitrust claims, once again we do not reach the question whether the district court has diversity jurisdiction over plaintiffs' nonfederal claims under 28 U.S.C. § 1332(a)(3). *See* 594 F.2d at 49 n.3. We also note that our reversal in this case vacates the district court's refusal to exercise pendent jurisdiction over the nonfederal claims. Contrary to the baseless argument made by defendants after the first remand, neither our prior opinion nor this one establishes as "law of the case" that pendent jurisdiction was properly declined.

15 U.S.C. §§ 1, 2. [3] Plaintiffs also claim that the two Mitsui defendants are liable for tortious interference with contractual relations. In our prior opinion, we detailed the plaintiffs' allegations concerning the defendants' efforts to deprive plaintiffs of their alleged contractual rights to a timber concession in East Kalimantan. *See* 594 F.2d at 50. We will not repeat those allegations here. We think it useful for the purposes of this appeal, however, to outline the procedural history of this case.

On June 19, 1975, plaintiffs filed their complaint in this action, along with a set of interrogatories and a document

---

[3] Section 1 of the Sherman Act, as amended, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by the fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1976). Section 2 of the Sherman Act, as amended, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1976).

Plaintiffs also alleged that the conspiracy was intended to and did restrain free competition in and increase the price of articles imported into the United States, in violation of § 73 of the Wilson Tariff Act, 15 U.S.C. § 73 of the Wilson Tariff Act, 15 U.S.C. § 8. Since neither party has discussed this claim either below or on appeal, we express no opinion on it.

request addressed to Mitsui-U.S.A. Response to the interrogatories and document request was made on October 1, 1975. On July 6, 1976, plaintiffs served a set of interrogatories and a document request on Mitsui-Japan, which did not respond until April 27, 1977. One month later, defendants served their motion for dismissal and summary judgment on grounds of standing, subject matter jurisdiction, and *forum non conveniens*. After replying to defendants' voluminous motion papers on October 11, 1977, plaintiffs attempted to continue discovery. On November 4, 1977, plaintiffs served notice that they would take the deposition of Mitsui-Japan on December 15 in Houston, Texas. After securing a postponement, Mitsui-Japan moved for a protective order on January 6, 1978, asking the court to stay all discovery on the ground that it had filed a dispositive motion and that "the questions raised in said motion are questions of law rather than questions of fact and involve, primarily, the insufficiency of plaintiffs' legal theories under the facts as alleged by them." [4] Responding to this motion, plaintiffs argued that it was "especially inappropriate" to stay the deposition of Mitsui-Japan while a summary judgment motion was pending, since plaintiffs were entitled to discover evidence establishing the existence of genuine issues of material fact.

The district court did not rule on the stay of Mitsui-Japan's deposition; it granted summary judgment on the act of state ground on February 28, 1978. This court's mandate reversing that judgment was not issued until September 4, 1979. When plaintiffs attempted to resume discovery by serving a notice of deposition of Mitui-U.S.A. on September 7, 1979, defendants

---

[4] Mitsui-Japan also argued that its deposition should be taken in Tokyo "or in the home cities" of the witnesses it designated as its representatives and that plaintiffs should be required to deposit $25,000 with the court to cover the costs of the deposition. We express no view as to how the district court should have resolved these contentions.

filed another motion to stay all discovery pending the court's resolution of the remaining grounds in its motion, again averring that "the issues raised are questions of law rather than questions of fact and involve, primarily, the insufficiency of plaintiffs' legal theories under the facts as alleged by them." After this motion and two others were denied in November and December of 1979, [5] Mitsui-U.S.A. produced employees for deposition in December. Then, on March 7, 1980, plaintiffs filed a motion to compel discovery, asking the court to resolve the issues concerning the deposition of Mitsui-Japan and also contending that Mitsui-U.S.A. had failed to present for deposition representatives with knowledge of the matters involved in this litigation.

Thirteen months later, without resolving any of the outstanding discovery issues, the court again granted summary judgment against plaintiffs. The court explained only that it found "[t]he arguments in Defendants' briefs" to be "merito-

---

[5] After the motion for a stay of all discovery was denied, defendants moved for a protective order which would exclude from Mitsui-U.S.A.'s deposition most of the matters listed in plaintiffs' notice of deposition solely on the ground that the matters were not "reasonably calculated to lead to the discovery of admissible evidence," Fed.R.Civ.P. 26(b)(1). Defendants offered no explanation why the matters listed were not relevant, and the matters were, at face value, plainly relevant. The district court denied the motion on December 7. Shortly before the deposition was to commence, defendants filed another motion, this time in the United States Supreme Court, asking for a stay of the deposition pending the Court's disposition of defendants' pending petition for a writ of certiorari. In their motion papers, defendants alleged that the witnesses for the deposition would have to travel from great distances; yet, the witnesses Mitsui-U.S.A. actually produced were located in Houston. The Supreme Court denied defendants' motion after the deposition had begun.

rious" and "dispositive." [6] Although the action had been pending for almost six years, plaintiffs had not been allowed to depose one of the defendants, and claimed that the deposition of the other was insufficient. Almost four years had been consumed by defendants' motion for dismissal and summary judgment and their attendant efforts to resist discovery on the ground that resolution of the motion could render further discovery unnecessary.

II. *The Extraterritorial Scope of the Sherman Act*

A. *Effect on United States Commerce*

A restraint that directly or substantially affects the flow of commerce into or out of the United States is within the scope of the Sherman Act. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S.Ct. 1404, 1413, 8

---

[6] In addition, the court granted summary judgment on a ground never advanced in defendants' briefs. Noting our prior decision that this action was not barred by the act of state doctrine, the district court held, without elaboration, that the action was barred by the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and the political free speech doctrine of *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38, 81 S.Ct. 523, 529-30, 5 L.Ed.2d 464 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965). This holding was clearly in error. We express no opinion, however, on whether the *Noerr-Pennington* doctrine would protect a person's petitions to a foreign government to take certain action. This issue was not briefed here or below. We do note that defendants' efforts to influence the actions of Telaga Mas are not protected by the *Noerr-Pennington* doctrine just as they were not protected by the act of state doctrine, simply because they later resulted in government action. Defendants have pointed to no acts of petitioning the government in the *Noerr-Pennington* sense. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08, 82 S.Ct. 1404, 1415, 8 L.Ed.2d 777 (1962) (explaining *Noerr*).

L.Ed.2d 777 (1962); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945) ("Alcoa"); 1 J. von Kalinowski, Antitrust Laws and Trade Regulation § 5.02[2][c] (1980); L. Sullivan, Antitrust 714-16 (1977). A review of the summary judgment submissions and evidence convinces us that defendants have not demonstrated that there is no genuine issue concerning the existence of a direct or substantial effect on United States foreign commerce. *See* Fed.R.Civ.P. 56(c); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157-61, 90 S.Ct. 1598, 1608-10, 26 L.Ed.2d 142 (1970) (burden on movant).

In their briefs prior to the first appeal, defendants' attack on the existence of an effect on United States commerce was only an attack on plaintiff's pleadings. Defendants placed their own characterization on the complaint and declared that the case involved only the tree-cutting business in Indonesia; thus, they concluded, their conduct had no effect on United States commerce. Plaintiffs had alleged, however, that Mitsui-U.S.A., an American corporation which imports a sizeable amount of lumber or lumber products into the United States, had conspired to keep them out of the business of harvesting trees and exporting logs and lumber from Indonesia to the United States. There was ample evidence in the record to show that Mitsui-U.S.A. had appropriated much of the business that plaintiffs claim they would have derived from the forestry concession: Mitsui-U.S.A. was purchasing the bulk of the logs from the concession and selling them for export to Mitsui-Japan at a substantial profit.

The competition between two American importers to obtain a source of supply on foreign territory affects the foreign commerce of the United States. *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 604-05, 615 (9th Cir. 1976); *see Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 811-17 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093, 89 S.Ct. 872, 21 L.Ed.2d 784 (1969); *cf. Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 113 n.8, 89 S.Ct. 1562, 1571 n.8, 23 L.Ed.2d 129 (1969) (American corporation's

participation in foreign patent pools); *Timken Roller Bearing Co. V. United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951) (division of foreign markets by American corporation and its foreign affiliates). Mitsui-Japan was allegedly a co-conspirator in this attempt to restrain competition between two American competitors. Thus, defendants' attack on the pleadings did not make it "appear[ ] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (motion to dismiss for failure to state a claim), *quoted in McLain* v. *Real Estate Board*, 444 U.S. 232, 245, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980) (challenge to "jurisdictional element" of a Sherman Act claim).

After we reversed the district court's first grant of summary judgment, the defendants shifted to a factual attack by arguing that the single, undisputed fact that Mitsui-Japan exported all of the lumber, purchased form Mitsui-U.S.A. in Indonesia, to Japan demonstrated that there was no genuine issue concerning an effect on United States commerce. Mitsui-Japan argued—and this is the argument it advances most strenuously in this court—that when a Japanese business competes with an American business in Indonesia and exports the fruits of that competition solely to Japan, any effect on United States commerce is purely incidental, indirect, and unintentional. Even if defendants' argument is correct—an issue we do not reach—it ignores the allegations in this case. Here, an American corporation with an interest in protection of its import business has allegedly conspired to eliminate a potential American competitor in both the business of purchasing logs in Indonesia and the business of importing lumber and lumber products into the United States.

Defendants' showing did not demonstrate that there was no genuine fact issue for the simple reason that defendants' showing was not responsive to plaintiffs' allegations. That one co-conspirator—Mitsui-Japan—followed a course of business action that, in isolation, might not be considered a violation of the

United States antitrust laws does not demonstrate either that the effect of the conspiracy as between the the American competitors is not an effect on United States commerce or that the intent of the conspiracy was not to restrain competition between the American competitors. "[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles [and] the proof is largely in the hands of the alleged conspirators. . . ." *Poller* v. *CBS, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). Summary judgment is even less appropriate here, where there is ample evidence of a conspiracy to keep plaintiffs from becoming a competitor, and plaintiffs have not had an opportunity to depose one of the conspirators on the effect and intent of their efforts.

B. *Comity and International Conflicts*

A district court should not apply the antitrust laws to foreign conduct of foreign actors if such application would violate principles of comity, conflicts of law, or international law. *See Alcoa*, 148 F.2d at 443; 1 J. von Kalinowski, *supra*, §§ 5.03 & 5.04. The act of state doctrine, which we rejected as a defense to this suit in the prior appeal, is an example of a principle of comity which, when applicable, prevents the court from entertaining a claim. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416-27, 84 S.Ct. 923, 934-40, 11 L.Ed.2d 804 (1964). Like the act of state doctrine, the question whether any other principle of comity, or of international law, or any conflicts of law analysis prevents the district court from entertaining the suit is a question of law which is fully reviewable by this court on appeal. [7]

---

[7] Several recent court of appeals decisions have proposed a conflict of laws analysis for determining whether the district court should entertain an antitrust claim involving extraterritorial conduct. *See Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d at 613-15; *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *In re Uranium Antitrust Litigation*, 617 F.2d 1248,

Defendants invoke the conflicts of law analysis established in *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d at 613-15. But their attempt to satisy the *Timberlane* test is a series of mere assertions, unsupported by the pleadings or by summary judgment evidence. For example, despite defendants' slightly familiar arguments, they have not demonstrated any "conflict with [the] law or policy" of the Indonesian government or any potential difficulty in enforcing a district court decree. *Timberlane*, 549 F.2d at 614. Neither the Indonesian court's nullification of plaintiffs' joint venture agreement

---

1253-56 (7th Cir. 1980). We commend their analysis, but we note that there has been some debate concerning the nature of the inquiry established. In a concurring opinion in *Mannington Mills*, Judge Adams argued that the test established in *Timberlane*, the leading case in this line, is a test of subject matter jurisdiction. *Mannington Mills*, 595 F.2d at 1299-1301. *See generally Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 494 F.Supp. 1161, 1171-77 (E.D.Pa. 1980). Like the Third Circuit majority and the Seventh Circuit, however, we do not read the *Timberlane* balancing test as a test of subject matter jurisdiction. *Compare Timberlane*, 549 F.2d at 602 (recognizing the rule that case should not be dismissed for lack of subject matter jurisdiction unless allegations are frivolous), *with id.* at 615 (concluding that plaintiffs' allegations of effect were sufficient to bring the case "within the jurisdiction of the federal courts," but remanding for further consideration of whether that jurisdiction should be exercised). Perhaps the confusion is a result of the use of the term "jurisdiction," which can have a number of meanings. But the meaning of "subject matter jurisdiction" in federal law is established by *Bell* v. *Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). *See Green* v. *Ferrell*, 664 F.2d 1292, 1294-95 (5th Cir. 1982). The wide-ranging inquiry suggested by *Timberlane* and its progeny does no fit within *Bell's* approach to subject matter jurisdiction.

We also disagree with the suggestion in *In re Uranium Antitrust Litigation*, 617 F.2d at 1255, that the question whether to entertain the suit is discretionary with the trial judge. A decision not to apply the antitrust laws must be based on solid legal ground; the question is one of interpreting the scope that Congress intended to give the antitrust laws. *Alcoa*, 148 F.2d at 433. It is a question of law that is fully reviewable on appeal.

with Telaga Mas nor the Indonesian government's action in cancelling its approval of plaintiffs' joint venture—both described in our prior opinion, *see* 594 F.2d at 50—has been shown to have been an approval of defendants' efforts to destroy the joint venture agreement or a determination that plaintiffs were not entitled to enforce their contractual rights or to do business in Indonesia. To the contrary, a second Indonesian court held that plaintiffs were not bound by the nullification order, and the Indonesian government invited plaintiffs and Telaga Mas to make a new agreement. *See id.* Moreover, the evidence in the present record more strongly supports the plaintiffs' contention that prosecution of this suit is fully consistent with the laws and policy of Indonesia because defendants' actions may have been torts or statutory violations under Indonesian law.

Defendants have demonstrated no basis for declining to entertain this suit. The grant of summary judgment on this ground was error.

III. *Standing*

In their original motion papers, defendants argued that plaintiffs did not have antitrust standing because they were not within the "target area" of the alleged anticompetitive acts and because any injury they suffered was merely derivative injury suffered as shareholders of other corporations. After remand, and on this appeal, defendants have argued that plaintiffs lack standing because they have not alleged "*antitrust* injury," invoking the italicized doctrine of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). [8] We deal with these contentions in turn.

A. *Target Area*

Section 4 of the Clayton Act grants a cause of action to "[a]ny person . . . injured in his business or property by reason of

---

[8] We note that *Brunswick* was decided four months before defendants first moved for dismissal and summary judgment.

anything forbidden in the antitrust laws." 15 U.S.C. § 15. It does not list the requirements of standing. *See* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum.L.Rev. 1, 24 (1971). Rather, standing is a judicially created doctrine designed to foreclose recovery to some plaintiffs who, although within the literal terms of § 4, have suffered injuries that are too "remote" or "indirect." *See Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975). Simply because an element of a private antitrust claim can be traced to the language of § 4 does not, as defendants seem to believe, make that element a component of "standing." The standing inquiry involves neither "the violation issue" nor "the damages issue." *Yoder Bros.* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1359-60 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977).

What standing does involve is the application of this circuit's test for standing, the "target area" test:

> To attain standing a person (whether corporation or individual) must be one against whom the conspiracy is aimed. Or, put in plutonomic terms, the complainant must show that he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry.

Jeffrey, 518 F.2d at 1131. Standing "is a preliminary [matter] to be answered *only* from an examination of the allegations of the complaint." *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 547 (5th Cir. 1980) (emphasis added), *cert. denied*, ___ U.S. ___, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981); *accord*, *Yoder Bros.*, 537 F.2d at 1359. [9]

---

[9] Our writing has not always been consistent with the principle that standing is a matter to be determined only from the pleadings. In *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 226 (1981), we were reviewing a jury verdict in favor of plaintiffs, two affiliated corporations. We upheld the trial court's grant of judgment n.o.v. against one of the plaintiffs because "there

Plaintiffs' allegations are clearly sufficient to give them standing. All three plaintiffs allege that they were to be direct participants in the harvesting and exporting of logs and lumber products from Indonesia, and the importing and marketing of such materials in several markets, primarily the United States. They allege that defendants destroyed plaintiff FPC's rights in the forestry concession in order to keep them out of harvesting, exporting, and marketing, businesses in which both defendants are allegedly engaged. Plaintiffs have also made detailed allegations concerning their intentions and preparations to enter these proposed businesses. *See Martin* v. *Phillips Petroleum Co.*, 365 F.2d 629, 633 (5th Cir.), *cert. denied*, 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451 (1966).

Thus, plaintiffs have alleged that they were attempting to enter "that sector of the econmy . . . endangered by a breakdown of competitive conditions;" indeed, they were the very persons "against whom the conspiracy [was] aimed." *Jeffrey*, 518 F.2d at 1131.

B. *Derivative Injury*

Defendants have constructed a "derivative injury" argument which is in part not a "standing" argument at all but a request for summary judgment on the factual issue of injury. First, they examine the relationship between the three corporate plaintiffs: plaintiff FPC, a Hong Kong corporation, was wholly owned by plaintiff Indonesia Industrial, another Hong

---

was *no* evidence" that defendants had caused an injury to competition in the separate market in which the plaintiff operated. *Id.* at 1362. While we termed this a determination of standing, it was, properly speaking, a determination that plaintiffs failed to prove allegations that would have given them standing—*i.e.*, they failed to prove that they had suffered an injury within the target area of the illegal restraint. The question whether plaintiffs have in fact suffered such injury is not properly termed a question of standing. *See Yoder Bros.*, 537 F.2d at 1359-60.

As will be seen, even if we construe defendants' standing arguments as a request for summary judgment on the fact of injury, defendants were not entitled to summary judgment on this ground.

Kong corporation; all of Indonesia Industrial's stock was owned by two other Hong Kong companies which held the stock in trust for the American parent, plaintiff Industrial Investment. Next, defendants point out that the forestry concession was to be operated by a never-formed Indonesian corporation to be owned by FPC and Telaga Mas. Beginning their legal argument, defendants declare that the only possible restraint on commerce caused or intended by their destruction of the joint venture between FPC and Telaga Mas was a restraint on the tree-harvesting business in Indonesia. Invoking the rule that a corporate shareholder has no standing to sue for antitrust injury to the corporation, *see Martens* v. *Barrett*, 245 F.2d 844, 846 (5th Cir. 1957), defendants argue that FPC's only injury was as a shareholder of the never-formed Indonesian corporation; that Indonesia Industrial's only injury was as a shareholder of FPC; and that Industrial Investment's only injury was as a shareholder of its Hong Kong subsidiaries. Finally, going beyond the pleadings, defendants question Indonesia Industrial's and Industrial Investment's claims that they would be directly involved in the export and marketing of logs and lumber products.

We reject defendants' argument for several reasons. First, defendants' contention that the only restraint was on the Indonesian tree-harvesting business is simply their own revision of plaintiff's pleadings. Plaintiffs have alleged that defendants were attempting to restrain competition in the harvesting, acquisition, export and marketing of logs from Indonesia, business activities in which the defendants are allegedly involved. Defendants cannot determine the intent and effect of the alleged conspiracy by *ipse dixit*.

Second, defendants read *Martens* v. *Barrett* too broadly when they contend that it deprives FPC of standing to seek damages for defendants' efforts to keep it out of the harvesting business. In *Martens* v. *Barrett*, two plaintiffs, the sole shareholders of a corporation that owned and operated a gas station, brought an antitrust action against the station's former distributor. We held that "where the business or property

allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders . . ., who has a right of recovery." 245 F.2d at 846. [10] We do not question that holding; it is fully consistent with one of the purposes of the doctrine of antitrust standing: avoiding "the problems of double recovery." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264, 92 S.Ct. 885, 892, 31 L.Ed.2d 184 (1972). Had we allowed the shareholders in *Martens* to recover, there would have been no assurance that the corporation would not later have sought damages in its own name. Moreover, there was no justification in *Martens* for not having the corporation bring suit.

The situation is vastly different when defendants' own actions are alleged to have aborted the entity which defendants claim has sole standing to sue. The antitrust standing inquiry is not a search for labels; it is a search for the most direct targets of the anticompetitive acts. *Jeffrey* v. *Southwestern Bell*, 518 F.2d at 1131 (citing *Martens*); *cf. Tugboat, Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir. 1976) ("[t]he key question" is whether plaintiffs themselves are within the target area, not whether they are "employees" of a business within the target area). There was no more direct target of defendants' alleged activity than FPC. Since the joint venture corporation was never formed, there is no possibility of double recovery. We hold that FPC has standing to challenge the alleged restraint in the harvesting business. [11]

Third, neither Indonesia Industrial nor Industrial Investment claims damages for injury to the value of its interest in

---

[10] *Accord, Mendenhall* v. *Fleming Co.*, 504 F.2d 879 (5th Cir. 1974).

[11] We do not thereby hold or imply that the Indonesian harvesting business is, in itself, within the reach of the antitrust laws. Whether plaintiffs can prove an injury within the extraterritorial scope of the Sherman Act awaits factual development in the trial.

another corporation. Each alleges injury by reason of a restraint on a business activity it claims it was preparing to enter.

Fourth, even if some of the damages from lost business claimed by Indonesia Industrial or Industrial Investment could be viewed as "deriving" from their relationship with FPC, it would not defeat their standing in this case. Each plaintiff alleges that it was plaintiffs' very competition that defendants were attempting to exclude. There is evidence in the record that supports these allegations, particularly the allegation that it was the American parent that defendants wanted to keep away from Indonesian timber. When a person is the direct target of an anticompetitive act, he has standing to sue for injury to his business. *See Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649-50, 89 S.Ct. 1871, 1875, 23 L.Ed.2d 599 (1969); [12] *Hayes* v. *Solomon*, 597 F.2d 958, 981 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1028, 62 L.Ed.2d 761 (1980). [13]

---

[12] In *Perkins*, Perkins sued not only for damages to his two corporations—which had assigned their claims to him, *see* 396 F.2d 809, 813-14 (9th Cir. 1967)—but also for losses "that he as an individual had suffered . . . because the two failing Perkins corporations . . . were unable to pay him agreed brokerage fees . . . , rental on leases . . . , and other indebtedness." 395 U.S. at 649, 89 S.Ct. at 1875. The Supreme Court reversed the court of appeals' ruling that these losses were too indirect to be "injuries" within the meaning of 15 U.S.C. § 15. "It is clear . . . that Perkins was no mere innocent bystander; he was the principal victim of the [antitrust violation]," *Id.* at 649, 89 S.Ct. at 1875.

[13] In the pertinent part of *Hayes* v. *Solomon*, plaintiff rented its movie theatre to defendants, its competitors. Plaintiff alleged that the defendants thereafter had improved the quality of their own theatres while ruining the good will of plaintiff's theatre by exhibiting X-rated films there. 597 F.2d at 971. Defendants argued that since plaintiff was not engaged in the film exhibition business during the damage period, it had no standing, invoking the general rule that a landlord may not sue for injury to the business he rents to. While we acknowledged that this principle was generally sound, we held it inapplicable because plaintiff had alleged "that the conspiracy was

Finally, defendants' contention that plaintiffs would not have been engaged in the businesses they claim is not a "standing" argument; it is a request for summary judgment on the fact of injury. We simply note that even if defendants had asked for summary judgment on this ground, they would not be entitled to it. The evidence in the record is sufficient to raise a genuine issue of fact.

C. *Antitrust Injury*

Defendants' argument that plaintiffs have no standing because they have not alleged "*antitrust* injury" misconceives both the holding of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489, 97 S.Ct. at 697, and the nature of standing. *Brunswick* is not a standing case. In *Brunswick* the Supreme Court was reviewing a jury's award of damages after a full trial on the merits. Plaintiffs had alleged that defendant, a major manufacturer of bowling equipment, had violated the antimerger provisions of the Clayton Act, 15 U.S.C. § 18, by acquiring and operating the bowling centers that had defaulted in paying for their equipment; plaintiff's sole proof of damages was the profits they would have made had the defaulting competitors gone out of business. The Supreme Court held this basis of damages "inimical to the purposes" of the antitrust laws; those laws were enacted to protect competition, while plaintiffs claimed injury because competition was not eliminated. *Id.* at 488, 97 S.Ct. at 697. The Court held that injury compensable under 15 U.S.C. § 15 must be

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants'

---

aimed at it; it was the alleged bull's-eye of the target. This alleged conspiracy was aimed at [it] as an eventual, inevitable competitor in the motion picture exhibition business . . . ." *Id.* at 981. Similarly, there is evidence in this record that defendants' conspiracy was aimed at Industrial Investment, the American parent, as defendants' "eventual, inevitable competitor."

> acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489, 97 S.Ct. at 697. The Court did not hold, however, that plaintiffs had no standing; it simply held that plaintiffs had failed to offer proof of "*antitrust* injury." [14] Indeed, the Court indicated that it would have remanded the case for a new trial had plaintiffs offered any proof of injury related to the anticompetitive effects of defendant's acquisition and operation of the competing bowling centers. *Id.* at 489-90, 97 S.Ct. at 698.

It is analytically unsound, we think, to consider the requirement of antitrust injury an additional component of the standing inquiry. Under traditional standing analysis, the court does not reach the substantive issues in plaintiff's complaint, *see* 13 C. Wright, A. Miller & E. Cooper, Federal Practices & Procedure § 3531, at 175-76 (1975); instead, the court assumes *arguendo* that plaintiff has pleaded and could prove a violation of substantive law, and asks only whether plaintiff has alleged a concrete injury and a sufficient causal relationship between the injury and the violation. *See Warth* v. *Seldin*, 422 U.S. 490, 498-502, 95 S.Ct. 2197, 2205-07, 45 L.Ed.2d 343 (1975). To be sure, the doctrine of antitrust standing requires a closer look at the nature of defendant's alleged conduct and its relation to the alleged injury: the court must identify the affected area of the economy and determine whether the alleged injury occurred within that area. *Yoder Bros.*, 537 F.2d at 1360. A person may suffer a causally related injury and still not have standing because the injury is too far removed from the area of commerce "endangered by a breakdown of competitive conditions." *Jeffrey*, 518 F.2d at 1131. Like traditional standing

---

[14] *See* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv.L.Rev. 1127, 1133 n.36 (1976) (concluding that plaintiffs in *Brunswick* were "clearly" within the "target area," but simply failed to prove the right kind of injury).

analysis, however, the antitrust standing inquiry does not permit the court to resolve such substantive issues as whether plaintiff has alleged a violation of law and whether plaintiff has in fact suffered injury. *See Yoder Bros.*, 537 F.2d at 1359-60.

The question whether plaintiff has alleged antitrust injury, by contrast, requires the court to look at the nature of the violation alleged and the injury that resulted and to determine whether that injury "flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. This determination is one of substantive law; indeed, such an inquiry could encompass every substantive issue in the case. To call such an inquiry a determination of standing not only "invites confusion," Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum.L.Rev. 979, 996 (1977), but it drains the term "standing": of any meaning. [15]

---

[15] There is dictum in one of our previous cases indicating that "antitrust injury" is a component of "standing." *Donovan Constr. Co. v. Florida Tel. Corp.*, 564 F.2d 1191, 1192 (5th Cir. 1977) (per curiam) (affirming district court's finding at trial that defendant did not intend to enter the relevant market), *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1878, 56 L.Ed.2d 389 (1978). Defendants rely on a similar dictum in *Hardwick v. Nu-Way Oil Co.*, 443 F.Supp. 940, 943 (S.D.Tex. 1978), *aff'd*, 589 F.2d 806 (5th Cir.), *cert. denied*, 444 U.S. 836, 100 S.Ct. 70, 62 L.Ed.2d 46 (1979). In reviewing *Hardwick*, however, we expressed no opinion on the district court's discussion of standing, assuming *arguendo* that plaintiff had antitrust standing. 589 F.2d at 807 n.3.

In *Guzik v. State Bar of Texas*, 659 F.2d 528 (5th Cir. 1981), we affirmed a grant of summary judgment because the record was "devoid of any evidence" suggesting that defendant State Bar of Texas had engaged in illegal price-fixing. *Id.* at 531. We labeled this conclusion, however, a determination of "standing." *See Id.* at 530, 531.

While *Guzik* and *Donovan Construction* were both correctly decided, the standing language in *Guzik* and the dictum in *Donovan*

We think that this case illustrates the importance of keeping these doctrines distinct. "Standing" is generally understood as an issue to be resolved by the court which does not require the court to determine the legality of defendant's alleged conduct. In this case the defendants moved for summary judgment only on grounds, such as standing, that apparently would not require the court to determine whether the defendants had violated the Sherman Act. In their original submissions, defendants argued that plaintiffs did not suffer "antitrust damages" becuase they were not in the "target area" of the alleged violation; after our first remand, and on this appeal, they have argued that plaintiffs did not suffer "antitrust injury" because they cannot prove a violation. [16] Thus, advancing an umbrella

---

Construction are inconsistent with the doctrine of antitrust standing as explained in *Yoder Bros.*, 537 F.2d at 1359-60.

We also recognize that two other circuits have held that antitrust injury is a component of standing. *Chrysler Corp* v. *Fedders Corp.*, 643 F.2d 1229, 1234 (6th Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 498-500 (9th Cir. 1977). But we disagree with their analysis.

[16] Construing defendants' motion as one for summary judgment on the violation issue, we hold that it lacks merit. Defendants argue that plaintiffs cannot prove a violation of the Sherman Act under our decisions in *Northwest Power Prods., Inc.* v. *Omark Indus.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1021, 59 L.Ed.2d 75 (1979), and *Burdett Sound, Inc.* v. *Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975). These decisions, which both involved a supplier's termination of a distributor, establish that the substitution of one competitor for another by means of unfair competition is not in itself a violation of the antitrust laws. Defendants argue that the allegations and proof in this case establish nothing more.

Whether conduct aimed solely at a competitor violates the Sherman Act depends upon the effect it has on competition in the relevant market. *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1350-51 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct.

concept of standing, they have attempted to transform the very nature of their motion for summary judgment.

Plaintiffs have standing to bring this suit.

IV. *Forum Non Conveniens*

The district court agreed with defendants' contention that Indonesia was a more convenient forum for this Sherman Act suit. This conclusion was error. The common law doctrine of *forum non conveniens* is inapplicable to suits brought under the United States antitrust laws. *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 68 S.Ct. 1169, 92 L.Ed. 1584 (1948).

In *National City Lines*, the district court dismissed a case brought under §§ 1 and 2 of the Sherman Act on the ground that another United States district court was a more convenient forum. The Supreme Court reversed, holding that the venue provisions of 15 U.S.C. § 22 [17] leave no room for judicial discretion to apply the common law doctrine of *forum non conveniens*. *Id.* at 588, 68 S.Ct. at 1177. Defendants argue that

---

1740, 68 L.Ed.2d 226 (1981); *see Northwest Power*, 576 F.2d at 89. Plaintiffs alleged that defendants have monopolized the relevant market. Because defendants' original motion papers gave plaintiffs no notice that they would need to produce proof on the issue of violation, it is understandable that plaintiffs did not respond with an affidavit under Fed.R.Civ.P. 56(f) requesting a continuance of the motion pending further discovery to support their allegations of market effect. We will not allow defendants to change their grounds of motion while simultaneously resisting discovery of the facts relevant to their new ground. Summary judgment on the violation issue was improper.

[17] Those provisions, taken from § 12 of the Clayton Act, remain unchanged today: "Any suit . . . under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business . . . ." 15 U.S.C. § 22.

National City Lines is distinguishable because it dealt with *forum non conveniens* "in a purely venue-related context." This argument is wrong for several reasons. First, it misstates the facts of *National City Lines*, which involved a dismissal, not a change-of-venue order. *Id.* at 577, 68 S.Ct. at 1172. Second, it misconceives the holding of *National City Lines*, which was that 15 U.S.C. § 22 was a statutory elimination of judicial discretion concerning where the case should be tried. Third, it ignores the reasons behind that holding, which apply with even greater force to this case. Those reasons were (1) that Congress had enacted the broad venue provisions of 15 U.S.C. § 22 to leave the choice of forum, within certain bounds, to plaintiffs' convenience, *see id.* at 581-88, 68 S.Ct. at 1174-77; (2) that permitting the application of *forum non conveniens* "inevitably would lengthen litigation already overextended," *id.* at 589, 68 S.Ct. at 1178, a prophecy that has come to pass in this case; and (3) that the application of the doctrine would be difficult in antitrust cases, "in which the violations charged are nationwide or nearly so in scope and effect, and the defendents are numerous companies widely scattered in the location of their places of incorporation, principal offices, and places of carrying on business and participating in the scheme." *Id.* at 591, 68 S.Ct. at 1179. The holding and rationale of *National City Lines* apply fully to this case. [18]

---

[18] Defendants argue that the Supreme Court "effectively nullified" its holding in *National City Lines* by its second decision in that case, *United States* v. *National City Lines*, 337 U.S. 78, 69 S.Ct. 955, 93 L.Ed. 1226 (1949). Shortly after the Court's first decision, Congress, in an unrelated move, enacted 28 U.S.C. § 1404(a), which authorizes the district courts to "transfer any civil action to any other district or division" "[f]or the convenience of parties and witnesses." In *National City Lines II*, the Court, relying on the legislative history and the broad term "any civil action," concluded that the transfer statute applied to antitrust actions. 337 U.S. at 80-84, 69 S.Ct. at 956-58. The Court in no way questioned its earlier holding concerning the effect of 15 U.S.C. § 22 on common law *forum non conveniens*. Since defend-

Even without the authority of *National City Lines*, we would reach the conclusion that antitrust cases cannot be dismissed on the ground that a foreign country is a more convenient forum. Sections 1 and 2 of the Sherman Act do not by their terms purport to define civil obligations owed by one party to another; they make it felonious to restrain unreasonably or to monopolize the commerce of the United States. [19] The treble damages action created for "private attorneys general" by § 4 of the Clayton Act, while "designed primarily as a remedy," *Brunswick*, 429 U.S. at 486, 97 S.Ct. at 696, is designed at least in part to "penaliz[e] wrongdoers and deter[ ] wrongdoing." *Id.* at 485, 97 S.Ct. at 696. Since it is a well-established principle of international law that "[t]he Courts of no country execute the penal laws of another," *The Antelope*, 23 U.S. (10 Wheat.) 66, 123, 6 L.Ed. 268 (1825); *accord*, Restatement (Second) of Conflict of Laws § 89 (1971), we have little doubt that the Indonesian courts would quite properly refuse to entertain plaintiffs' Sherman Act claim. A dismissal for *forum non conveniens*, then, would be the functional equivalent of a decision that defendants' acts are beyond the reach of the Sherman Act. [20] Defendants cannot use the

---

ants can point to no statute authorizing dismissal of an action on *forum non conveniens* grounds, *National City Lines II* does not help them in any way.

[19] For the text of §§ 1 and 2, see note 3 *supra*.

[20] After this case was taken under submission, the Supreme Court decided *Piper Aircraft Co.* v. *Reyno*, ___ U.S. ___, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), and held that "[t]he possibility of a change of substantive law" does not preclude a dismissal on grounds of *forum non conveniens*. *Id.* at ___, 102 S.Ct. at 261. That holding is not inconsistent with our analysis here, *Reyno* involved the civil obligations owed by one private party to another in a tort case; by contrast, a private antitrust suit is conceived as a part of the scheme of enforcement of statutes enacted to protect United States commerce. *See, e.g., Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 342, 99 S.Ct. 2326, 2333-34, 60 L.Ed.2d 931 (1979). In *Reyno*, there was no question that

rules of *forum non conveniens* as a substitute for the rules concerning the extraterritorial application of the Act.

Defendants argue that, even if *forum non conveniens* does not apply to a Sherman Act claim, the district court's dismissal of plaintiff's nonfederal claim on grounds of *forum non conveniens* was not a clear abuse of discretion under the standards set out in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 511-12, 67 S.Ct. 839, 844, 91 L.Ed. 1055 (1947), and recently applied in *Piper Aircraft Co.* v. *Reyno*, ___ U.S. ___, ___, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (1981). But once it is concluded that the Sherman Act claim should not have been dismissed, the question is not whether, as an original matter, it would be more convenient to hear the nonfederal claim in Indonesia, but whether it would be more convenient to force the parties to litigate two suits, one on the antitrust claim here, the other on the tort claim in Indonesia. The answer in this case is an obvious one: dismissal of the nonfederal claim would be a clear abuse of discretion. Such a course would simply force the litigants to undergo twice all of the inconveniences posited by defendants. [21] To a great extent, the two claims involve the same events, evidence, and witnesses. It would be far more convenient to resolve both claims in one trial.

REVERSED AND REMANDED.

---

the doctrine of *forum non conveniens* was applicable; the only question was "the proper application of the doctrine." ___ U.S. at ___, 102 S.Ct. at 261. In this case, the question is whether the doctrine should apply at all.

[21] Defendants point to problems in translations and access to sources of proof. Since this case involves actors and evidence in Indonesia, Japan, and the United States, these problems will be encountered whether the nonfederal claim is tried here or in Indonesia. Much documentary proof has already been amassed here. Japanese witnesses will simply have to travel to two foreign countries if the case is split between the United States and Indonesia.

Defendants also assert that "expert witnesses on Indonesian law reside in Indonesia." We find it hard to believe that there are no experts on Indonesian law in this country.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 75-H-1041

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, INDONESIA INDUSTRIAL INVESTMENT CORPORATION, LTD., and FOREST PRODUCTS CORPORATION, INC.,
Plaintiffs

v.

MITSUI & CO., LTD., MITSUI & CO. (U.S.A.), INC., and P. T. TELEGA MAS KALIMANTAN CO.,
Defendants

ORDER

The judgment of dismissal entered in this action was reversed by the United States Court of Appeals for the Fifth Circuit, and the cause remanded. *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). The remaining four grounds on which Defendants rest their motion for summary judgment are: (1) Plaintiffs lack standing since they have incurred only derivative damages as shareholders; (2) the subject matter of this action is beyond the extraterritorial reach of American antitrust laws; (3) Plaintiffs are not within the "target area" of antitrust law protection; and (4) forum non conveniens.

The fact that a complaint contains federal antitrust claims does not bar summary judgment where appropriate. *Alladin Oil Co.* v. *Texaco, Inc.*, 603 F.2d 1107, 1111 (5th Cir. 1979). Based upon a consideration of the entire record, the Court is of the opinion that there is no genuine issue of material fact, *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568

F.2d 1186, 1188-90 (5th Cir. 1978), and that this action must be dismissed for the reasons stated in grounds (1), (2), (3) and (4). The arguments in Defendants' briefs in support of these grounds are meritorious and the Court finds them to be dispositive.

The Court, in its discretion, *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726 (1966), declines to exercise pendent jurisdiction over Plaintiffs' claims for misappropriation, conversion, intereference with contractual relationships and breach of contract based on Texas and Indonesian law due to lack of a substantial federal claim. The Court is of the opinion that Plaintiffs cannot raise these issues under diversity jurisdiction because complete diversity of citizenship is lacking. *See Ed. & Fred, Inc.* v. *Puritan Marine Insurance Underwriters Corp.*, 506 F.2d 757, 758 (5th Cir. 1975); *Lavan Petroleum Co.* v. *Underwriters at Lloyds*, 334 F. Supp. 1069, 1071 (S.D.N.Y. 1971). The Court is also persuaded that Texas courts, applying the contract and tort conflict of laws rules in effect in 1975, would hold that Indonesian and not Texas laws governs Plaintiffs' non-federal claims. *See* 12 *Texas Jurisprudence 2d*, Conflict of Laws §§ 9-13 (1960) and cases cited therein.

The "act of state" doctrine against a review by a United States court of the propriety, validity or motives behind the actions of a foreign sovereign has been found inapplicable by the Court of Appeals. This Court is of the opinion that this case is controlled by the distinguishable doctrine elucidated in cases such as *Parker* v. *Brown*, 317 U.S. 341 (1943), *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1975).

It is, therefore,

ORDERED that Defendants' motion for summary judgment is GRANTED.

DONE at Houston, Texas, this 6th day of April, 1981.

/s/ Ross N. Sterling
ROSS N. STERLING
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 75-H-1041

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, *et al.*,

v.

MITSUI & CO., LTD., *et al.*,

February 28, 1978

Memorandum And Order:

This is an antitrust action brought in United States District Court to rectify alleged commercial mischief abroad. Defendants have moved to dismiss this action on five grounds:

(1) Plaintiffs lack standing since they have incurred only derivative damage as shareholders;

(2) The extraterritorial effect of American antitrust laws does not extend so far as to reach this case;

(3) Plaintiffs are not within the "target area" of protection afforded by the antitrust laws;

(4) Forum Non Conveniens;

(5) Act of state doctrine.

From a study of the pleadings, and with the benefit of seven volumes of exhibits accompanying the exhaustive briefs of the parties, it is the opinion of this court that the act of state doctrine precludes judicial review of this case, therefore the other prongs of Defendants' motion need not be reached. Plaintiffs have also alleged claims of conversion, misappropriation, interference with contractual and business relationships, and

breach of contract seeking to invoke pendent jurisdiction. There being no substantial federal claim, these other causes of action will also be dismissed for lack of jurisdiction.

The court has considered the mountainous stack of exhibits in reaching its decision, therefore it will give Rule 56, Fed.R.Civ.P., treatment to the Rule 12(b)(6) motion to dismiss. Although the granting of such motions in complex antitrust litigation is not favored, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486 (1962), the complexity of such litigation is often unnecessarily developed, and the court is convinced that there are no factual disputes in this case as to the few essential facts underpinning this decision. Those facts are as follows.

The American link on the Plaintiffs' side is Industrial Investment Development Corporation (IIDC), a Virginia corporation. IIDC is the beneficiary of a trust held by Lex LTD and Rex LTD. The corpus of the trust is the Indonesia Industrial Investment Corporation Ltd. (IIIC), a Hong Kong corporation. IIIC wholly owns another Hong Kong corporation, Forest Products Corp. Ltd. (FPC) which is the principal actor in this Indonesian affair. These three corporations are the Plaintiffs in this suit.

Plaintiffs sought to enter the logging and lumber products business in East Kalimantan (Borneo), Indonesia. The forests in Indonesia are owned by the Indonesian government. That government requires any foreign enterprise to form a joint venture with an Indonesian partner before it will be allowed to do business in Indonesia. This joint venture must then form an independent Indonesian corporation by which business must be conducted. However, the formation of these business alliances does not give anyone the right to begin the harvesting of the lumber. A concession or cutting license must be granted from the government through its Department of Forestry.

Pursuant to these governmental requirements, FPC entered into a joint with an Indonesian corporation, Telaga Mas Kalimantan Co. (Telega Mas). On July 1, 1971, FPC, Telaga

Mas and the Indonesian Director General of Forestry entered into a Three Way Agreement by which terms were agreed upon as to the operating of the enterprise, *if* a cutting license were issued by the government. The Three Way Agreement provided for its own termination if no license issued. Ultimately no license was ever issued.

These facts are uncontroverted. Plaintiffs, however, would have the court shift its view from these facts to the more controversial allegations of conspiracy. Plaintiffs allege that the defendants infiltrated Telaga Mas executive suite and found a turncoat to poison the FPC-Telaga Mas marriage. Two shareholders meetings of Telaga Mas were held. Regardless of their validity and fairness, it is undisputed that the first meeting ratified the Three Way Agreement while the latter invalidated the agreement. The battleground then switched to the Indonesian courts. The first two lawsuits upheld the validity of the second shareholders meeting and declared the Three Way Agreement unenforceable. The final lawsuit, however, resulted in a judgment that reversed the prior decision concerning the enforceability of the Three Way Agreement. In the meantime, the Director General of Forestry had cancelled the Three Way Agreement. Regardless of this cancellation and the ping-pong shareholders meetings and judgments, it is undisputed that a cutting license had never been and never was issued.

Plaintiffs contend that the poisoning of the FPC-Telaga Mas joint venture caused the cancellation of the Three Way Agreement which in turn caused the government to deny FPC a concession. It is this two step inquiry which is prohibited by the act of state doctrine. Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind that act, no matter how unscrupulous, is beyond judicial review. This is the precise reasoning behind *Hunt* v. *Mobile Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), where it was stated:

> "Hunt's complaint does not name Libya as a defendant or in any way suggest that it is a co-conspirator of the

named defendants. Nonetheless Judge Weinfeld reasoned that the combination or conspiracy charged did not of itself cause the damage complained of but rather that the damage resulted from the action of Libya in cutting back Hunt's production, shutting off its oil and finally natinalizing its properties. Thus he found that Hunt would be required to establish that *but for* the conspiracy Libya would not have committed any of these aggressive actions. This he decided would require judicial inquiry into 'acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions.' 410 F. Supp. at 24. He concluded that this inquiry was foreclosed under the act of state doctrine."

Similarly, in *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D.Cal. 1971), aff'd 461 F.2d 1261 (9th Cir. 1972), the court concluded that the foreign states' territorial aggressiveness which ousted the plaintiff from a concession was the ultimate cause of the damage complained of, and therefore was barred from judicial review stating:

"There is, moreover, a further dimension to this case's implication of foreign acts of state. Because a private antitrust claim requires proof of damage resulting from forbidden conduct, e.g., Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742, 750-751 (9th Cir. 1936), cert. den. 299 U.S. 613, 57 S.Ct. 315, 81 L.Ed. 452 (1937); Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., 346 F.2d 1012, 1014 & n.1 (9th Cir.), cert. den., 382 U.S. 958, 86 S.Ct. 433, 15 L.Ed.2d 362 (1965), plaintiffs necessarily ask this court to 'sit in judgment' upon to sovereign acts pleaded, whether or not the countries involved are considered co-conspirators. That is, to establish their claim as pleaded plaintiffs must prove, *inter alia*, that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the island of Abu Musa at the behest of the defendants. Plantiffs say they stand ready to prove the former allegation by use of 'internal documents.' But such inquiries by this court into the authenticity and motivation of the acts of foreign soverigns would be the very sources of diplomatic friction and complication that

> the act of state doctrine aims to avert. *See Sabbatino, supra*, 376 U.S. at 423-424, 431-433, 84 S.Ct. 923."

Therefore, regardless of the proof offered by the Plaintiffs as to a conspiracy to break up the FPC-Telaga Mas joint venture, it is evident that the whole issue of such a conspiracy is irrelevant since the damage complained of stems directly from the denial of a governmental concession to cut timber. Any inquiry into the reasons for such denial is barred by the act of state doctrine. The recent U.S. Supreme Court case, *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854 (1976), does not help Plaintiffs' case. *Dunhill* merely excluded from the act of state doctrine those acts of a soverign which are purely commercial in nature. The court reasoned:

> "In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on national nerves." 96 S.Ct. at 1866.

The act in question here is the government denial of a concession to harvest logs which are owned by the government. This is not the type of act which *Dunhill* seeks to exclude as a purely commercial activity. Dunhill involved a plaintiff who paid funds to a Cuban government controlled corporation for the purchase of cigars. The cigar business was subsequently nationalized and the plaintiffs sued for the funds paid to the predecessor government controlled corporation. It was the failure to pay a commercial debt which the *Dunhill* court considered to be so entrepreneurial that the act of state doctrine would not apply. The same reasoning applies to *Timberlane Lbr. Co.* v. *Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), in which the act of state doctrine was not applied to an enforcement by Hondurian officials of a judicial decree by which commercial security interests held by defendants were given recognition. It is the degree to which an American court must inquire into matters that turn on national political interests which triggers the act of state doctrine.

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923 (1964). The denial of a concession to harvest government owned forests is a political, peculiarly governmental act of a sovereign. Perhaps the actions of the government in entering and terminating the Three Way Agreement may be considered commercial, proprietal acts, but the ultimate question as to the granting of the concession is purely a political issue barred from judicial review by the act of state doctrine.

The Plaintiffs had cleared a major hurdle in the forming of the three part agreement. However, this was only the beginning and despite any great expectations of the parties involved, the delivery of the concession was still vulnerable to the whim of a foreign government. No guarantees were made. The forming of the three party agreement created no privileges in the land. In fact the continuity of the three party agreement was conditional on the granting of a concession. The government was at liberty at all times to grant or deny such privilege. The motivation for their ultimate denial cannot be the basis of an antitrust suit pursuant to American laws. Therefore, it is

ORDERED that Defendants' motion to dismiss construed as a motion for summary judgment is hereby GRANTED and Plaintiffs' complaint is in all things DISMISSED.

DONE at Houston, Texas, this 28th day of February, 1978.

/s/ Ross N. Sterling
ROSS N. STERLING
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 78-1775

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, INDONESIA INDUSTRIAL INVESTMENT CORPORATION, LTD., and FOREST PRODUCTS CORPORATION, LTD.,
Plaintiffs-Appellants,

v.

MITSUI & CO., LTD. and MITSUI & CO. (U.S.A.), INC.,
Defendants-Appellees.

April 25, 1979

Rehearing and Rehearing En Banc Denied July 6, 1979

Before JONES, CLARK, and INGRAHAM, Circuit Judges.

CHARLES CLARK, *Circuit Judge:*

The sole issue in this appeal is whether the act of state doctrine precludes a trial of plaintiffs' antitrust action. [1] Plaintiffs claim damages from Mitsui & Co., Ltd., a Japanese corporation, and its American subsidiary, Mitsui & Co.

[1] The named plaintiffs in this action are industrial Investment Development Corporation (an American Corporation) and its two Hong Kong corporate subsidiaries, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd. They are collectively referred to as Industrial Investment or plaintiffs throughout this opinion.

(U.S.A.), Inc., for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 & 2, and Section 73 of the Wilson Tarrif Act, 15 U.S.C.A. § 8. The complaint appended state law claims of tortious interference with contractual relations against those defendants and a breach of contract charge against the Indonesian defendant, P. T. Telaga Mas Kalimantan Co. Following extensive discovery, the district court granted defendants' motion for summary judgment. Defendants urged their motion on five grounds: (1) plaintiffs lack standing since they have incurred only derivative damage as shareholders; (2) the extraterritorial reach of American antitrust laws cannot grasp this case; (3) plaintiffs are not within the "target area" of antitrust law protection; (4) forum non conveniens; (5) act of state doctrine. The district court's decision was based solely on the ground that the act state doctrine prevented judicial review of the federal claims. [2] Because its ruling on the federal claims, the district court exercised its discretion to dismiss the pendent state claims. [3]

The district court's invocation of the act of state doctrine in this case was in error. Although the regulations of a foreign state, Indonesia, formed part of the background to the activities alleged, neither the validity of those regulations nor the legality of the behavior of the Indonesian government is in question here. The mere fact that members of the Indonesian government were to play a part in the alleged scheme does not insulate defendants' accountability for conduct which might prove to be prohibited by our antitrust laws.

The present dispute evolves from plaintiffs' desire to enter the logging and lumber products business in East Kalimantan

---

[2] We express no opinion on the merits of assertions (1)-(4).

[3] Plaintiffs argue that independent diversity jurisdiction exists for the state claims. Because we find the federal claims justiciable, we need not resolve the dispute over the proper interpretations of the federal diversity statute, 28 U.S.C.A. § 1332.

(Borneo), Indoensia. Late in the 1960s, the government of Indonesia began developing a plan for encouraging and regulating foreign private capital investment. The consequent Foreign Capital Investment Act provided for restrictions of private investment in certain fields, required the development of Indonesian manpower, and required opportunities for Indonesian co-ownership. Thus a foreign company could not conduct business within that country until it joined with a local company, and they together organized an independent limited liability company under Indonesian law. Known as P.T.'s (Perseroan Terbatas), these companies, which are closely analogous to American corporations, must have their organization approved by the government before they become effective.

Land use is also subject to regulation under the Act. A properly organized P.T. cannot harvest timber from the state-controlled land until it has been granted a concession and cutting license by the Department of Forestry pursuant to an aplication for forestry exploitation rights. The procedure contemplates preliminary surveys and negotiations between the applicant and the Director General of Forestry resulting in tentative concession rights embodied in a Forestry Agreement. The Agreement, accompanied by an Application Letter drafted by the P.T., is then to be submitted to the Minister of Agriculture within one month. Delay in submitting the Application Letter is considered grounds for revoking the Forestry Agreement. The Agreement and Letter must be channeled through the Department. Following approval and payment of a concession fee, the Director General of Forestry issues a formal concession decree and a license which establishes the new company and authorizes its logging operations, subject to revocation for failure to carry out its obligations under the Forestry Agreement. Harvesting cannot begin until the license has been issued. [4]

---

[4] *See generally*, Republic of Indonesia, *Invest in Indonesia* (January 1972).

In 1970 Industrial Investment [5] signed a joint venture agreement with Telaga Mas to harvest logs from a timber concession which had been granted to Telaga Mas in a government forest in Borneo. Under the agreement, Industrial Investment was to provide equipment, capital requirements and management, and supervisory and technical personnel. In exchange, Telaga Mas expressly agreed to cooperate in obtaining the necessary approvals for establishing the P.T. and securing the formal concession decree and cutting license.

Throughout the first six months of 1971 plaintiffs and Telaga Mas jointly negotiated with the Indonesian government for its approval of the proposed business. As a result, a Forestry Agreement was signed by the two companies and the Director General of Forestry on July 1, 1971. The Agreement set forth the capital, organization, and administrative requirements to be completed by the two firms before payment of the concession fee to the government and issuance of the cutting license to the newly formed P.T. The Agreement also contained provisions relating to the operation of the joint concession. More importantly, it reserved to the Department of Forestry the right to cancel for failure of the joint venture partners to cooperate or carry out their duties, and provided that cancellation of the joint venture agreement prior to the issuance of the license certificate would automatically terminate any rights of the parties to conduct lumbering operations. No license ever issued.

The district court refused to consider plaintiffs' allegations of a Sherman Act conspiracy since in its opinion the absence of an authorizing license governed the disposition of the case. Plaintiffs allege that the Mitsui defendants infiltrated and usurped control of the Telaga Mas management for the pur-

---

[5] Forest Products Corporation of Delaware, a predecessor company of Industrial Investment, conducted the initial negotiations. For clarity we refer to the American company as Industrial Investment throughout.

pose of destroying plaintiffs' interest in the proposed logging concession. The complaint intricately details a plot, spawned from a 1972 increase in the price of timber, in which the Mitsui companies, past purchasers and creditors of Telaga Mas, decided first to eliminate Industrial Investment and then to protect its competitive edge by secretly taking direct supervision and control of the Telaga Mas operations for its own profit. Implementation of the scheme began when a shareholder group led by Harianto, a Telaga Mas official who was secretly backed by Mitsui, challenged the authority of Telaga Mas official, Sadjarwo, to execute the Forestry Agreement on behalf of Telaga Mas. Separate competing shareholder meetings were held by Harianto and Sadjarwo, each affirming the corporate authority of the leader of its respective faction. Eventually an Indonesian court declared Harianto's group to be properly in power and nullified the joint venture agreement.

When the news reached the Director General of Forestry, he sent a letter to plaintiffs and to Telaga Mas in which he "cancelled and affirmed invalid" the Forestry Agreement. In the same letter, he invited plaintiffs and Telaga Mas under its newly declared leadership to execute a new agreement. The cancellation, plaintiffs argue, was the natural operation of the Agreement's automatic termination provisions.

In a separate action, a second Indonesian court subsequently held that Industrial Investment was not bound by the nullification order since it was not a party to that action. Harianto continued to rule Telaga Mas, however, and refused to honor or participate in the joint venture with plaintiff.

Industrial Investment contends that defendants' poisoning of the joint venture caused the cancellation of the Forestry Agreement which in turn caused the government to deny the concession. The district court found that the act of state doctrine prohibited such a "two-step inquiry." It concluded: "Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind the act, no matter how unscrupulous, is beyond judicial review."

The act of state doctrine has arisen as a means of determining the appropriateness of adjudicating in a United States court a dispute which in some manner involves a foreign government. As classically stated:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

Underhill v. *Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897).

Early application of this doctrine was often muddled with the doctrine of sovereign immunity or principles of conflicts of law. [6] Since *Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (91964), however, the doctrine has emerged as independently based on conerns of separation of powers. The *Sabbatino* Court, cautious of judicial interference in executive affairs, refused to adjudicate the validity of expropriation by the Cuban government of property

---

[6] In *Underhill*, for instance the defendant Hernandez was acting as an agent for the sovereign in which the alleged torts occurred. Thus the result could be said to rest on the personal immunity of foreign sovereigns. *Note*, The Act of State Doctrine: Antitrust Conspiracies to Induce Foreign Sovereign Acts, 10 Int'l Law and Politics 495 (1978). *See Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). *See also, Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 705 n. 18, 96 S.Ct. 1854, 1866-67 n. 18, 48 L.Ed.2d 301 (1976). There is some authority that the doctrine still reflects conflicts of laws principles. This position assumes the validity of a foreign state's acts under the laws of that state. Applying the foreign laws to those acts, therefore, precludes an inquiry by American courts into their validity. *See* Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247 (1977).

within its own territory owned by American nationals. [7] Its decision was based on several factors which pointed to the executive branch as the more appropriate tribunal to deal with the sensitive political issues. All related to the possible adverse consequences of an American court attempting to resolve the validity of title to property not within its jurisdiction or to judge a foreign state's power to expropriate the property of aliens. Of significance is the Court's express refusal to lay down "an inflexible and all-encompassing rule" of judicial abstention in every case not totally isolated to this country. 376 U.S. at 428, 84 S.Ct. at 940. Instead, it declared a less brittle doctrine, one with the "capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." 376 U.S. at 427-28, 84 S.Ct. at 940. Relying on traditional political question reasoning, it found that the doctrine was not constitutionally compelled but that it rested on " 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers." 376 U.S. at 423, 84 S.Ct. at 938. [8] *Sabbatino's* "proper distribution" depended on several factors, which concerned the

---

[7] Although *Sabbatino's* bar agains claims based on the asserted invalidity of Cuban confiscations has been legislatively overruled by the "Hickenlooper Amendment," Foreign Assistance Act § 301(d)(4), 22 U.S.C.A. § 2370(e)(2) (1970), the case is still the leading authority on the act of state doctrine.

[8] Recently this circuit refused to rule on an act of state defense in a suit presenting conflicting claims to oil extracted from the *Persian Gulf, Occ. of Umm al Qaywayn* v. *A Certain Cargo*, 577 F.2d 1196 (5th Cir. 1978). Because the action required a determination of sovereignty over the well area, the case was dismissed as a nonjusticiable political question. In a brief discussion of the source of the act of state doctrine, we noted that "the better view would be that the doctrine is constitutionally compelled by the concept of separation of powers and placement of plenary foreign relations powers in the executive." 577 F.2d at 1200-01 n. 4.

ramifications of judicial intervention on executive conduct of international relations or of inconsistent judicial and executive behavior.

The Supreme Court has recently reaffirmed this policy of balancing executive and judicial concerns in *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). Because the Court "decline[d] to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations," *Dunhill* has become known as the "commercial exception" to the act of state doctrine. Dunhill had mistakenly made an overpayment to Cuba for cigars purchased from expropriated cigar businesses. The Court permitted adjudication of his claim of debt against Cuba:

> [S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. . . . Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."

425 U.S. at 703-04, 96 S.Ct. at 1866 (footnote omitted). Industrial Investment has urged application of this "commercial exception" to the Indonesian licensing structure. We need not reach the merits of this contention. [9]

---

[9] A majority of the Court never supported a broad "commercial act" exception to the act of state doctrine. Justice Stevens specifically omitted this part in his concurrence to Justice White's majority opinion, and it was rejected by the four dissenters. However, the Second Circuit, at least in dictum, has treated a commercial exception as firmly established. *Hunt* v. *Mobil Oil Co.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977). *See* Rationalizing the Federal Act of State Doctrine and Evolving Judicial Exceptions, 46 Fordham L.Rev. 295 (1977).

Situations have arisen in which the Supreme Court has found the involvement of a foreign state to be too insignificant to invoke the act of state doctrine. For instance, the instigation of foreign governmental involvement does not mechanically protect conduct otherwise illegal in this country from scrutiny by the American courts. In *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1926), a conspiracy which affected United States commerce was held not to be immune from judicial review of Sherman Act claims even though its success was due in part to procurement of discriminatory foreign legislation. The Court distinguished an earlier antitrust case, *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909), in which the act of state doctrine was held to bar adjudication of claims that defendants had influenced Costa Rica to seize plaintiff's property. *American Banana* also held that the Sherman Act could not be applied against conspiracies occurring outside this country. That latter rule of law has been repudiated. Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the United States. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *United States* v. *Sisal Sales Corp.*, *supra*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042; *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

The conspiracy in *American Banana* took place outside the United States and resulted in Costa Rica's seizure of plaintiff's property there. The seizure was valid in Costa Rica and the Court held that its validity could not be challenged in American courts. The *Sisal* conspiracy, by comparison, allegedly destroyed plaintiff's sisal exportation business, not by government expropriation, but by the American corporate defendant's takeover aided by foreign legislation. The *Sisal* Court was not interested in the validity of the legislation but was concerned with redressing the anticompetitive effects on American commerce caused by the conspiracy.

Similarly, a stage fortuitously set by existing foreign legislation cannot automatically be invoked to shield conspiracies to restrain United States trade. In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), defendants were charged with conspiring to monopolize the American vanadium industry by currying the favor of a private Canadian corporation designated as exclusive purchasing agent of vanadium by the Canadian government. Drawing from the authority of *Sisal*, the Court rejected the defense that the Canadian law permitted discriminatory purchasing by the authority having power to designate purchasing agents. It was enough that plaintiff claimed that the loss of its business was caused by defendants' actions. The Court was careful to note that the Canadian government itself was not a defendant in the action and that the validity of its legislation was not in issue.

The participation of the Indonesian government in the context of the present analysis cannot prevent Industrial Investment from having its claims adjudicated by the district court. There are no special political factors which outbalance this country's legitimate interest in regulating anticompetitive activity both here and abroad. [10] As in *Sisal* and *Continental Ore*, the complaint charges parties subject to the court's jurisdiction with conduct occurring within this country and elsewhere which violates United States law. To determine whether there has been a violation of American antitrust law it

---

[10] In cases dealing with the enforcement of antitrust laws in the face of state action, we note that the approach of the courts has been to weigh the relative interests of the state and federal governments to determine whether the anticompetitive harm of the activity outweighs the benefits of state regulation. *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

is not necessary to resolve the propriety of Indonesia's failure to issue a cutting license. To protect American antitrust policies, an American court need not embark on an adjudication of the validity of that government's behavior. The Ninth Circuit recently stated:

> The touchstone of *Sabbatino*—the potential for interference with our foreign relations—is the crucial element in determining whether deference should be accorded in any given case. We wish to avoid "passing on the validity" of foreign acts. *Sabbatino*, 376 U.S. at 423, 84 S.Ct. 923. Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of *Sabbatino*, *id.* at 428, 84 S.Ct. at 940, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

Timberlane Lumber Co. v. *Bank of America*, 549 F.2d 597, 607 (9th Cir. 1976).

The government of Indonesia is not a named co-conspirator here. Its right to withhold a cutting license is not questioned. This is the major factor distinguishing this case from right to ownership cases such as *American Banana* and *Sabbatino*. For instance, in *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (D.C. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), the plaintiffs, holders of a Middle East oil concession from one of the Trucial States, charged the defendants with inducing an adjacent sheikdom in the Persian Gulf, Sharjah, to grant them a conflicting concession covering the same area. The court invoked the act of state doctrine to avoid having to adjudicate which of the two competing sheikdoms had superior authority to grant the concession. It was found that, to establish their claim as pleaded, plaintiffs had to prove that Sharja's concession was fraudently issued. Passing upon such foreign governmental acts was considered more appropriate for the executive branch in its handling of foreign relations. By comparison, resolution of the charges made by Industrial Investment does not require a determination of plaintiffs' right

to receive a cutting license from the Indonesian government. Unlike *Occidental* where plaintiff's asserted claim arose through rights granted by a foreign government, Industrial Investment's interest in its business venture with Telaga Mas may be protected from disruptive conduct of competitors by United States antitrust laws.

The only connection which the government of Indonesia has with this action is through application of its Foreign Investment Act, the validity of which is not questioned. The challenge is that a commercial endeavor failed by virtue of external disruptive forces acting on the contractual relationship between private citizens. We need not decide whether, had Telaga Mas not refused to cooperate, the license would have issued as a certainty. It is enough that plaintiffs have offered proof to show that defendants conspired to cause it potential to exploit the Borneo concession to die aborning. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *H & B Equipment Co., Inc.* v. *International Harvester*, 577 F.2d 239 (5th Cir. 1978); *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978). Whether the Indonesian government would have issued a cutting license is relevant only to the value of the destroyed joint venture, not to liability for its destruction.

But the Mitsui defendants argue (and the district court agreed) that the damage complained of stems directly from the denial of the government concession to cut timber. In order to establish therefore that defendants' behavior caused the injury, it would be necessary for the court to investigate the Director of Forestry's motiviation in cancelling the agreement. This they say amounts to a prohibited inquiry into the validity of governmental activity. However, plaintiffs' complaint does not limit their allegation of injury from the antitrust cause of action to the inability to harvest Indonesian timber. They assert: "The wrongful acts of Defendants and their co-conspirators have deprived it of its contract and concession

rights, of its ability to enter and compete in the market, and of the profits it would have derived from such operations." They insist here that even before it was known whether a license would issue, these rights had a substantial value which they could have proven. Plaintiffs are entitled to recover damages for injury to these "business or property" interests if they are caused by antitrust violations. 15 U.S.C.A. § 15. All the injuries contended for may potentially satisfy that description. *North Texas Producers Association* v. *Young*, 308 F.2d 235 (1962), *cert. denied*, 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed.2d 733 (1963). *See Hunt* v. *Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1976), *rev'd on other grounds*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977).

The authority asserted to support Mitsui's position is *Hunt* v. *Mobil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977), and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D.Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972). Both cases involved expropriation by a foreign state of plaintiffs' properties. This distinction alone is of major significance. The *Hunt* court itself, refusing to apply the precedent of *Sisal*, stated:

> [*Sisal*] considered the assistance of the sovereign through the mechanism of favorable legislation engineered by the defendants to be of considerably less moment than the expropriation by the state of the plaintiff's properties in [*American Banana*].

550 F.2d at 75. Furthermore, separation of powers consideration in *Hunt* strongly counselled against the court's interference. [11] Despite these distinctions, the *Hunt* opinion

---

[11] The complaint by Hunt, an independent oil producer holding oil concessions in Libya, charged defendants, the seven major oil companies, with fraudulently inducing Hunt to be uncooperative in pricing negotiations with Libya. Hunt did so, and Libya retaliated by nationalizing Hunt's properties thus totally eliminating Hunt from the field of competition. Libya was incensed. It loudly proclaimed its

broadly states that in order to prove damages an antitrust plaintiff must show that *but for* the conspiracy the foreign government would not have acted as it did. This, the court continues, requires an inquiry into the motivation of the foreign state and "that inevitably involves its validity." 550 F.2d at 77.

This broad language in *Hunt* has been criticized for encouraging use of the act of state doctrine as a shield by private conspirators who are able to include some foreign governmental act in their anticompetitive scheme. [12] We do not

---

purpose to give the United States "a big hard blow in the Arab area on its cold, insolent face." 550 F.2d at 73 *quoting* Statement of the State Department, Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 93d Cong., 2d Sess., pt. 6, at 316-17 (1974). In response, the United States government wrote the Libyan government and characterized the expropriations as "political reprisal against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya." 550 F.2d at 73, *quoting*, A. Rovine, Digest of United States Practice in International Law 1973 at 335. The Second Circuit refused to upset the executive's identification of Libya's motivation by another inquiry which "could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine in issue." 550 F.2d at 77-78

The court found that, even if the Department of State had not openly expressed its position, the political and diplomatic dimensions were too burdensome for resolution by the judiciary: "The action taken here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants." 550 F.2d 78. No such "implications and complications" hinder a resolution of Industrial Investment's antitrust claims here.

[12] Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247 (1977); Note, the Act of State Doctrine: Anti-Trust Conspiracies to Induce Foreign Sovereign Acts, 10 Int'l Law and Politics 495 (1978).

agree that, in establishing a causal relation between the private violations alleged and the injuries suffered, the plaintiffs must prove that defendant's acts were the sole cause of the injury. Of course, plaintiffs must show a causal relationship between defendants' anticompetitive actions and the harm suffered. *Radiant Burners, Inc.* v. *Peoples Gas*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961). However, inquiry beyond the fact of some damage flowing from the unlawful conspiracy relates only to the amount and not the fact of damage. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129 (1969); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, *supra*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544; *E & B Equipment Co., Inc.* v. *International Harvester*, *supra*, 577 F.2d 239; *Heatransfer* v. *Volkswagenwerk, A.G.*, *supra*, 553 F.2d 964. Furthermore, we disagree that motivation and validity are equally protected by the act of state rubric. *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, 370 U.S. 705, 82 S.Ct. 1404; *Timberlane Lumber Co.* v. *Bank of America*, *supra*, 549 F.2d 597. Precluding all inquiry into the motiviation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action. Industrial Investment must only question that government's motivation to the extent of measuring its damage. No ethical standard is set by which the propriety of its decision is tested. Surely the limited nature and effect of determining the proportional cause of plaintiff's damage allocable to defendants' conduct does not trigger the type of special political considerations protected by the act of state doctrine.

The objective sought by passage of the Sherman Act is preservation and maintenance of effective competition in this country. *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d cir. 1945). To provide an act of state shield to business entities whose activities happen to reach beyond United States soil would thwart this objective. The courts are an important forum for protection against competitive restraints. Although

the act of state doctrine is a vital rule of judicial abstention in the field of foreign relations, it does not apply in this case.

REVERSED and REMANDED.

JONES, dissenting:

The district court's decision as succinctly and accurately stated in the majority opinion, is "that the damage complained of stems directly from the denial of the government concession to cut timber." I am like minded. If the statement be true then the Act of State doctrine requires a dismissal of the action.

APPENDIX E

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

OCTOBER TERM, 19____

No. 81-2175

D.C. Docket No. CA-75-H-1401

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, *et al.*,
Plaintiffs-Appellants,

v.

MITSUI & CO., LTD., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before COLEMAN, REAVLEY and SAM D. JOHNSON, *Circuit Judges.*

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this case be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay the costs on appeal to be taxed by the Clerk of Court.

MARCH 31, 1982

Issued As Mandate: MAY 24, 1982

APPENDIX F

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 81-2175

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, *et al.*,
Plaintiffs-Appellants,

v.

MITSUI & CO., LTD., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 31, 1982, 5 Cir., 198__, ____ F.2d ____).
(May 5, 1982)

Before COLEMAN, REAVLEY and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal

Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
THOMAS M. REAVLEY
United States Circuit Judge

APPENDIX G

The following entities are subsidiaries of Mitsui & Co., Ltd., or Mitsui & Co. (U.S.A.), Inc.

Kokusai Nochikusan K.K.
Mitsui Bussan Kaigai Ringyo Kaihatsu K.K.
Astral International Corp.
Avant Petroleum, Inc.
Channel Terminal Corporation
Clarkston Grain Terminal, Inc.
Falcon Systems International, Inc.
Gulf Coast Grain, Inc.
Gulf Grain Export Corporation
Harborland Corporation
Intercontinental Bulk Systems, Inc.
International Corn Company
Kahuku Agricultural Co. (Hawaii) Inc.
King Neptune Sales Corp.
La Place Elevator Company, Inc.
M.M.T.S. Inc.
Maripac International, Inc.
McCarty Resources Corporation
Mitsui Export Corporation
National Plywood, Inc.
Neptune Packing Corp.
Nitrojen Injection Corporation
Pacific Grain Co.
Pacific Resources, Inc.
Petroleum H.B. Limited
Red-White Valve Corp.
Reliance Steel Company, Inc.
SSC International, Inc.
Sea-Port Steel Co.
Shofer's Sports, Inc.
Soma Sports, Inc.
St. John's Stevedoring Company, Inc.
TCM America (MBK), Inc.

United Grain Corporation of Oregon
United Grain Sales Corp.
Van Brunt Port Jersey Warehouse, Inc.
Weisner Steel Products, Inc.
West Coast Lumber Operations Co.
World of Wheels, Inc.
Yanmar Tractor (U.S.A.), Inc.
Aito K.K.
Akita Bridgestone Gas K.K.
Akita Seishi K.K.
K.K. Aomori Bridgestone Gas Center
Arbor Acres Japan Co., Ltd.
Bussan Apparel K.K.
Bussan Credit K.K.
Bussan Electrical Technical Services Co., Ltd.
Bussan Food Sales Co., Ltd.
K.K. Bussan Food Service
Bussan Fudosan K.K.
Bussan Kyoseki Oil Sales Co., Ltd.
Bussan Textile K.K.
K.K. Celtec
Chiba Kenzai Kogyo K.K.
Chita Futo K.K.
K.K. Chita Kyodo Yuso Center
Chlorine Engineers Corp.
Columbia Suisan K.K.
Daiichi Brass K.K.
Daiichi Bussan K.K.
K.K. Daiichi Farm
Daiichi Nenryo Co., Ltd.
Daiichi Reizo Co., Ltd.
Daiichi Service Co., Ltd.
Daiichi Tanker K.K.
Daito Kagaku Co., Ltd.
Eiwa Sangyo K.K.
Furubayashi Sangyo Y.K.
Furukawa Kogyo K.K.
Fushiman Co., Ltd.
Gold Packaging Co., Ltd.
Gunsan Silk Manufacturing Co., Ltd.
K.K. Hakone Suisanbutsu Ryutsu Center

Hakuryu Lime Mfg. Co., Ltd.
Hermes Shipping K.K.
Hirohata Denji Center K.K.
Hirobishi Soko Unyu K.K.
K.K. Hokkai
Hokuriku Bridgestone Gas K.K.
Ibaragi Ichirei K.K.
K.K. Ichirei
International Agriculture Co., Ltd.
International Marine Consultant Co., Ltd.
International Shrimp Inc.
Ishii Tetsusho Co., Ltd.
Iwate Seimai K.K.
Japan Chemical Transportation Co., Ltd.
Japan Central System Co., Ltd.
Japan Gordon Johnson Co., Ltd.
Japan Herr Co., Ltd.
Kamogawa Kogyo K.K.
Kanagawa Bridgestone Gras K.K.
Kanto Denko Kaisha Ltd.
Keiyo Toshi Service Co., Ltd.
K.K. Kinoshita
Kokusai Kookuu Kyuyu K.K.
Kokusai Oil and Chemical Co., Ltd.
Kokusai Yuso K.K.
Kyoka Sangyo K.K.
Kyushu Yugyo K.K.
Lange Far East K.K.
Mainto Bauten Kaihatsu K.K.
K.K. Maoka Seisakusho
K.K. Mickey Store
Mikuni Canteen K.K.
Mikuni Coca Cola Bottling Co., Ltd.
Mikuni Data Service K.K.
Mikuni Service K.K.
Mitsui Board Kako K.K.
Mitsui Bussan K.K. (Minato-ku, Tokyo)
Mitsui Bussan K.K. (Chuo-ku, Tokyo)
Mitsui Bussan Chemical Machinery Co., Ltd.
Mitsui Bussan Denshi Hanbai K.K.
Mitsui Bussan Forestry Co., Ltd.

Mitsui Bussan Home Supply Co., Ltd.
Mitsui Bussan Kikai Hambai K.K.
Mitsui Bussan Leather Hanbai K.K.
Mitsui Bussan Machine Tool Co., Ltd.
K.K. Mitsui Bussan Nagoya Kozai Center
Mitsui Bussan Nosan Hanbai K.K.
Mitsui Bussan Oil Supply Co., Ltd.
Mitsui Bussan Plastic Hanbai K.K.
Mitsui Bussan Sporting Goods Co., Ltd.
Mitsui Concrete Industrial Co., Ltd.
Mitsui Liquefied Gas Co., Ltd.
Mitsui Lumber Co., Ltd.
K.K. Mitsui Mokuzai Kenzai Center
Mitsui Overseas Forestry Development Co., Ltd.
K.K. Mokkan
Muromachi Sangyo Co., Ltd.
Nagoya Remicon K.K.
Nasu Onsen Kaihatsu K.K.
Nesko Co., Ltd.
Nippon Brunswick Co., Ltd.
Nippon Gas Yusoo K.K.
Nippon Reyland K.K.
Nippon Reyland Hanbai K.K.
Nippon Sherwood Medical Industries Ltd.
Nishi Nippon Shoji K.K.
Nitto Warehouse Co., Ltd.
Northwest Uranium Kaihatsu K.K.
K.K. Odawara Oil Hasegawa Shoten
Oita Bridgestone Gas K.K.
Osaka Bussan Plastics Hanbai K.K.
Osaka Daiichi Service Co., Ltd.
K.K. Osawa Seisakusho
Owner's Engineer's Corp.
Romur K.K.
Sagami Green City Development Co., Ltd.
K.K. Sagamiko Picnic Land
Sanei Shiryo Chikusan K.K.
Sanko K.K.
K.K. Sanko Shokuhin Service
Sanmoku Kogyo K.K.
Sansen Bussan K.K.

Sanwell Industry K.K.
Sanyo Kogyo K.K. (Tokyo)
Sanyo Kogyo K.K. (Saitama)
Sanyo Hydrographic Survey Co., Ltd.
Sanyuu Shokuhin K.K.
Sapporo A and A Broiler K.K.
Sapporo Liquors Co., Ltd.
Saskatchewan Uranium Kaihatsu K.K.
Satsuki Coca-Cola Canning Co., Ltd.
Shin Nagoya Remicon Yusoo K.K.
Shin Nippon Kaiso K.K.
Shinsei Kogyo K.K.
Shoku Co., Ltd.
Shoku Gokin K.K.
Shoku Kogyo K.K.
K.K. Shoyu
Sight and Sound Education (Japan), Ltd.
Sogo Boeki K.K.
Soigne K.K.
Taiheiyo Suisan Kaisha, Ltd.
Toa Chemical Industry Co., Ltd.
Tobu Iryo Kaisha, Ltd.
Tohoku Mori Shigyo K.K.
Toho Mink Co., Ltd.
Tokyo Goohan K.K.
Tokyo Kanzai K.K.
Toshin Soko Kaisha, Ltd.
Toyama Liquefied Gas K.K.
Toyo Koosan K.K.
Toko Officemation Inc.
Toyo Shoji K.K.
Toyo Shoji Kohan Kakoo K.K.
Toyo Tekko K.K.
Toyo Valve K.K.
Toyo Waso K.K.
Toyo Wire Manufacture Co., Ltd.
Ueda Koki K.K.
Wakamatsu Seisen K.K.
Yakushima Suigen K.K.
Yamagata Kooki K.K.
Yamato Kagaku Kogyo K.K.

Yokohama Coil Center Co., Ltd.
Yubari Takinoue Mokuzai K.K.
Alsas Inc.
Kodiak Lumber Mills, Inc.
M/T Ammonia Ltd.
North American Forestry Development Inc.
Portac Forest Products, Inc.
Alfarl Pty Ltd.
Ceramica del Valle Ltda.
Deutsche Roosevelt Trading Co. G.m.b.H.
Distribuidora Toyota Chile Ltda.
Ensel Engineering Services (Asia) Pty Ltd.
Excelship Navigation, S.A.
Fertilizantes Mitsui Industries e Comercio S.A.
Fraser Wharves Ltd.
P.T. Gaya Persaki Synthetics
General Appliance Co., Ltd.
Graciela Shipping Inc.
Ing-Wang Clothing Mfg. Co., Ltd.
International Corn Co.
Korea Sanyo Kogyo, Ltd.
Leedenhall Enterprises Ltd.
Lepta Shipping Co., Ltd.
Mima International Bivate Ltd.
N.V. Misuca Europe S.A.
Mitcorn A.G.
P.T. Mitsugoro
Mitsui & Co. (Australia), Ltd.
Mitsui & Co. (Canada), Ltd.
Mitsui & Co. Europe G.m.b.H.
Mitsui & Co. Europe Ltd.
Mitsui & Co. Europe S.A.
N.V. Mitsui & Co. Europe (Benelux) S.A.
Mitsui & Co. Europe (Espana) S.A.
Mitsui & Co. Europe (Italia) S.p.A.
Mitsui & Co. Europe (Netherlands), B.V.
Mitsui & Co. Europe (Norway) A.S.
Mitsui & Co. Europe (Portugal) Ltd.
Mitsui & Co. Europe (Scandinavia) A.B.
Mitsui & Co. (Hong Kong), Ltd.
Mitsui & Co. Iran Ltd.

Mitsui & Co. (New Zealand) Limited
Mitsui & Co. (Panama), S.A.
Mitsui & Co. (Panama International), S.A.
Mitsui & Co. (Thailand) Ltd.
Mitsui Argentina S.A.C.I.F.
Mitsui Brasileira Imp. e Exp. Ltda.
Mitsui Chilena Comercial Ltda.
Mitsui-C Itoh Iron Pty. Ltd.
Mitsui Coal Development (Australia) Pty. Ltd.
Mitsui Coal Development (Canada) Ltd.
Mitsui Computer Systems (Australia) Pty. Ltd.
Mitsui de Colombia S.A.
Mitsui del Ecuador S.A.
Mitsui del Peru S.A.
Mitsui de Mexico, S.A. de C.V.
Mitsui de Venezuela C.A.
Mitsui International Petroleum (Hong Kong) Co. Ltd.
Mitsui Iron Ore Development Pty. Ltd.
Mitsui Machinen G.m.b.H.
Mitsui Machinery Sales (U.K.) Ltd.
Mitsui Salt Pty. Ltd.
Mitsui Yoshioka do Brasil Agro-Industrial Exportadora
MTG Marine Inc.
P.T. Palembang Timber Development Co., Ltd.
P.T. Pro-Intercontinental Terminals Indonesia
P.T. Promits Engineering & Construction
Roosevelt Trading Amsterdam B.V.
South Pacific Fishing Co., Ltd.
P.T. Tiga Manungal Synthetic Industries
Titan Steel & Wire Co. Ltd.
Transporte Industrial Transin Ltda.

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MITSUI & CO., LTD., ET AL.,

Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

LOUIS PAINE
Counsel of Record
Hayden Burns
Butler, Binion, Rice, Cook & KNAPP
1100 Esperson Building
Houston, Texas 77002
(713) 237-3111

FITZHUGH H. PANNILL, JR.
5311 Kirby, Suite 216
Houston, Texas 77005
(713) 529-4673

Attorneys for Respondents

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
STATEMENT	2
REASONS THE WRIT SHOULD BE DENIED	3
1. The decision below was based primarily on the court of appeals' rejection of Defendants' factual claims, and its review at this time would be a needless waste of this Court's resources	3
2. The decision below on the issue of jurisdiction is consistent with the decision of this Court and the circuit courts and presents no new questions for this Court's review	4
3. The Court below resolved the standing issue in a manner consistent with the decisions of this Court and the other circuits	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:

American Banana Co. v. *United Fruit Co.*, 213 U.S. 347 (1909)	6
Blue Shield v. *McCready*, 50 U.S.L.W. 4723 (U.S. June 21, 1982)	7
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)	7
Chrysler Corp. v. *Fedders Corp.*, 643 F.2d 1299 (6th Cir.), *cert. denied*, 102 S. Ct. 388 (1981)	8
Continental Ore Co. v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962)	6
John Lenore & Co. v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977)	8
National Bank of Canada v. *Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981)	5
Occidental Petroleum Corp. v. *Butte Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1262 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972)	6

PAGE

Pacific Seafarers, Inc. v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969) .. 6

Timberlane Lumber Co. v. *Bank of America*, 549 F.2d 597 (9th Cir. 1976) 6

United States v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) 6

United States v. *Sisal Sales Corp.*, 274 U.S. 268 (1927) 6

Statutes:

Sherman Act § 2, 15 U.S.C. § 2 7

Sherman Act § 1, 15 U.S.C. § 1 8

Rules:

Fed. R. Civ. P. 12 ..... 4, 7

Fed. R. Civ. P. 56 ..... 4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-178

MITSUI & CO., LTD., ET AL.,

Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, Industrial Investment Development Corporation, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd., file this Brief opposing the Petition for a Writ of Certiorari filed by Mitsui & Co., Ltd. ("Mitsui-Japan"), and Mitsui & Co. (U.S.A.), Inc. ("Mitsui-USA"). Consistent with their status in the trial court, Petitioners will be referred to herein as "Defendants" while Respondents will be called "Plaintiffs."

QUESTIONS PRESENTED

SHOULD THE SUPREME COURT GRANT CERTIORARI IN ORDER TO REVIEW ARGUMENTS AS TO THE NATURE, WEIGHT, AND SUFFICIENCY OF THE SUMMARY JUDGMENT EVIDENCE IN A CASE IN WHICH DISCOVERY HAS NOT BEEN COMPLETED?

ARE CONSPIRACIES WHICH OCCUR IN THE UNITED STATES AND ABROAD AND WHICH DIRECTLY AND SUBSTANTIALLY AFFECT THE FOREIGN COMMERCE OF THE UNITED STATES WITHIN THE SCOPE OF THE ANTITRUST LAWS?

DO PLAINTIFFS HAVE STANDING TO BRING AN ANTITRUST SUIT PREMISED ON ALLEGATIONS OF DIRECT INJURIES RESULTING FROM A CONSPIRACY TO ELIMINATE PLAINTIFFS AS COMPETITORS?

STATEMENT

On June 19, 1982, this case was seven years old.[1] It has been dismissed twice by the Honorable Ross N. Sterling, District Judge for the Southern District of Texas, on the basis of a motion for summary judgment and voluminous supporting documents filed by the Mitsui Defendants in 1977.[2] Both dismissals were reversed by the United States Court of Appeals for the Fifth Circuit in opinions which analyzed the complex evidence in this case in considerable detail.[3] Both opinions concluded that Defendants' various theories were supported neither by the governing pleadings nor by the evidence thus far adduced.[4] This Court denied the petition for writ of certiorari filed by Defendants after the first reversal[5] and denied Defendants' motion to stay proceedings filed after the decision under consideration.[6]

---

[1] See *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 671 F.2d 876, 881-82 (5th Cir. 1982).

[2] *Id.* at 882.

[3] *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 671 F.2d 876 (5th Cir. 1982); *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

[4] *Id.*

[5] *Mitsui & Co., Ltd.* v. *Industrial Investment Development Corp.*, 445 U.S. 903 (1980).

[6] *Mitsui & Co., Ltd., et al.* v. *Industrial Investment Development Corp., et al.*, Application for Stay of Execution and Enforcement of the Judgment of the United States Court of Appeals for the Fifth Circuit, No. A-1038 (denied June 3, 1982).

The deposition of Mitsui-Japan, which was noticed in 1977,[7] was begun in Tokyo in July of 1982. It has not yet been completed.

REASONS THE WRIT SHOULD BE DENIED

1. The decision below was based primarily on the court of appeals' rejection of Defendants' factual claims, and its review at this time would be a needless waste of this Court's resources.

Consideration of Defendants' motion for summary judgment has thus far consumed over five years and has generated twenty briefs,[8] five opinions,[9] two thousand pages of appendices, and numerous related motions, replies and other papers. These include some nineteen separate instruments in which Defendants seek a delay or continuance.[10] All of this time, expense and judicial effort has been invested in order to save Defendants the trouble of appearing for deposition and attending trial.

By their second petition for writ of certiorari,[11] Defendants ask this Court to sift through a record of thousands of pages and rule on factual questions which are peculiar to this litigation. They also ask that these factual rulings be made not only before a

---

[7] See 671 F.2d at 881.

[8] In the district court, see Docket Nos. 67, 75, 79, 81, 83, 113, 115, 117, 118. In the Court of Appeals for the Fifth Circuit, see C.A. No. 78-1775; C.A. No. 81-2175. In the Supreme Court, see No. 79-552.

[9] See note 3, *supra* (court of appeals); C.A. 75-H-1041, Docket No. 84, 139 (district court).

[10] In the district court: Docket Nos. 10, 16, 80, 83, 94, 96, 104, 106, 131. In the court of appeals, C.A. No. 78-1775: Motion to Stay Mandate; Motion to Stay Proceedings; Response to Plaintiffs' Opposition to Stay; C.A. No. 81-2775: Motion for Extension of Time; Opposition to Plaintiffs' Motion to Expedite Appeal; Opposition to Motion to Issue Mandate; Motion to Stay Mandate. In the Supreme Court, No. 79-552: Application for Stay of Proceedings; No. A-1038: Application for Stay of Execution & Enforcement.

[11] Defendants' second Petition for Writ of Certiorari will be referred to as "the Petition".

trial, but before they have been deposed. As noted in the opinion below, this case is a textbook example of the wisdom of this Court when it directed that "summary procedures should be used sparingly in complex antitrust litigation."[12] The real issue in this case is not whether Plaintiffs have standing or whether the federal courts have jurisdiction, but whether the Defendants have met their burden under Rules 12 and 56. The evidentiary arguments contained in the briefs and discussed in the opinions below clearly show that this is not and never was an appropriate case for summary consideration.

It would serve neither the interests of justice nor the administration of the judicial system for this Court to review the record in this case before that record has even been completed. The decision below is not a final judgment. The court of appeals has merely remanded this case for completion of discovery and trial.[13] If there are any substantial legal questions, they should be decided after the facts have been determined.

2. The decision below on the issue of jurisdiction is consistent with the decisions of this Court and the circuit courts and presents no new questions for this Court's review.

Defendants' jurisdictional argument is premised upon a misstatement of the court of appeals' holding on this issue. According to Defendants, the court below has broadened extraterritorial jurisdiction to include almost anything:

> In the view of the court of appeals, an alleged foreign restraint of trade is within the scope of the Sherman Act so long as it "affects the flow of commerce into or out of the United States .....".

Petition, p. 6.

---

[12] 671 F.2d at 884, quoting *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

[13] 671 F.2d at 889-90, 891.

What the court below actually held is as follows:

> A restraint that directly or substantially affects the flow of commerce into or out of the United States is within the scope of the Sherman Act. See *Continental Ore Company* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 704 (1962); *United States* v. *Aluminum Co. of America*, 148 F.2d 443-44 (2d Cir. 1945).

671 F.2d at 883.

The rule announced and followed by the court of appeals is obviously not in conflict with *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981). That case involved activities which had occurred wholly abroad and which neither had, nor were intended to have, any effect on United States commerce.

The allegations and evidence in the case at bar, on the other hand, compel a finding of jurisdiction. The petition's description of the record, like its description of the court of appeals' opinion, is simply unreliable. The production from the timber concession was not just "potentially available" for the United States market, as Defendants claim.[14] On the contrary, Plaintiffs had specifically designated the United States as their main market long before this suit was filed.[15] Similarly, the competition involved in the instant case was not simply between Plaintiffs and Mitsui-Japan in the production of Indonesian logs,[16] but was between Plaintiffs and Mitsui-USA in the importation of lumber and wood products into the United States.[17] Nor do Defendants

---

[14] Petition, p. 6.

[15] See Foreign Investment Application Form B (Revised Project Proposal), Plaintiffs' Trial Appendix. p. 234 (Rec. No. 75).

[16] Petition, pp. 3, 6.

[17] See 671 F.2d at 883; see also Brief of Appellants, C.A. No. 81-2175, United States Court of Appeals, Fifth Circuit, footnotes 90-103 and accompanying text.

discuss the allegations and ample evidence that acts in furtherance of the conspiracy were committed by Mitsui-USA on United States soil and in the actual course of United States commerce.[18]

The facts of this case would satisfy the jurisdictional requirements imposed by any decision on this issue since *American Banana.*[19] See, e.g., *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 704 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945); *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 604-05, 615 (9th Cir. 1976); *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 811-17 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093, 89 S.Ct. 872, 21 L.Ed.2d 784 (1969); *Occidental Petroleum Corp.* v. *Butte Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1262 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

3. The Court below resolved the standing issue in a manner consistent with the decisions of this Court and the other circuits.

In the case before this Court, Defendants conspired to eliminate Plaintiffs as competitors both in the production of Indonesian timber and in the importation of lumber and wood products to the United States.[20] Plaintiffs seek damages for lost profits from operations in direct competition with Defendants.[21] The allegations and supporting evidence establish a physical and economic nexus between the violation and the alleged harm and state a claim for relief of the type Congress sought to redress by

---

[18] See 671 F.2d at 883; see also Brief of Appellants, *supra*, note 17, footnotes 58, 64, 105-06 and accompanying text.

[19] *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909).

[20] See 671 F.2d at 883-84.

[21] See 671 F.2d at 886, 887.

the antitrust laws.[22] This case clearly satisfies the requirements stated by this Court both in *Blue Shield* v. *McCready*, 50 U.S.L.W. 4723 (U.S. June 21, 1982) and in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

The standing argument in the petition is not based on the different factors addressed by this Court in *McCready* and *Brunswick*. Instead, Defendants argue that Plaintiffs have not suffered "antitrust injury" solely because of Defendants' assertion that their own conduct did not constitute an antitrust violation. [23] Fundamental to their current standing argument is the proposition that they were entitled to summary judgment on the issue of violation, and that the failure to address this question under the heading of "standing" was the sole ground for the decision below.[24]

The petition fails to mention that the court of appeals did consider and decide the very "violation" argument on which this standing theory is premised. The court expressly ruled that Defendants were not entitled to summary judgment on the issue because they had never properly presented it and had refused to submit to discovery on the question.[25]

It obviously makes no difference that the court below rejected Defendants' antitrust theory under Rule 56 rather than under Rule 12, which is Defendants' complaint.[26] Furthermore, as the petition itself concedes, Plaintiffs have also alleged a claim under Section 2 of the Sherman Act,[27] and it is clear that Defendants'

---

[22] See 671 F.2d at 886.

[23] Petition, p. 10.

[24] Petition, pp. 9, 10.

[25] 671 F.2d at 889-90, footnote 16 and accompanying text.

[26] Petition, pp. 10, 11.

[27] Petition, p. 10, footnote 6.

"standing" defense under Section 1 would not be dispositive of the litigation even if it had merit.[28]

The purely academic complaint raised by Defendants' petition was not addressed in *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1299 (6th Cir.), *cert. denied*, 102 S.Ct. 388 (1981), or in *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977), and the instant case does not conflict with those decisions.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LOUIS PAINE
Counsel of Record
HAYDEN BURNS
BUTLER, BINION, RICE, COOK & KNAPP
1100 Esperson Building
Houston, Texas 77002
(713) 237-3111

FITZHUGH H. PANNILL, JR.
5311 Kirby, Suite 216
Houston, Texas 77005
(713) 529-4673

[28] Plaintiffs have also invoked diversity jurisdiction in connection with their non-federal or tort claims under 28 U.S.C. § 1332 (a)(3). The court of appeals has not ruled as to the existence of diversity jurisdiction. See 671 F.2d at 880-81, footnote 2.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari have been delivered to the attorneys for Petitioners, Mr. B. J. Bradshaw, Fulbright & Jaworski, 800 Bank of the Southwest Building, Houston, Texas 77002, on September .., 1982.

.....

Fitzhugh H. Pannill, Jr.